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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE CITY OF DETROIT,

Petitioner,

v.

THE COUNTY OF OAKLAND and
THE COUNTY OF MACOMB,

Respondents.

PETITION OF THE CITY OF DETROIT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit properly ruled that Respondents have standing to sue under Article III, Section 2 of the U.S. Constitution when there was no allegation or proof of injury in fact.

2. Whether the Sixth Circuit violated the principles of standing set forth by this Court and created a conflict among the Circuits when it ruled that Respondents have standing to bring suit under Section 4 of the Clayton Act, 15 U.S.C. § 15, for an alleged antitrust conspiracy when Respondents, pursuant to a statutorily imposed cost plus contract, can show no injury because they were mere conduits for funds from the municipalities and end users and made no profits from nor contributed to any loss of said funds.

3. Whether the Sixth Circuit properly ruled that Respondents have standing to bring suit under the Racketeer Influenced and Corrupt Organizations Act [RICO] 18 U.S.C. § 1964(c), for an alleged bribery and mail fraud scheme when Respondents, pursuant to a statutorily imposed cost plus contract, can show no injury because they were mere conduits for funds from the municipalities and end users and made no profits from nor contributed to any loss of said funds.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, other parties to the proceeding below in the Sixth Circuit are Coleman A. Young; Nancy Allevato, as the Personal Representative of the Estate of Michael J. Ferrantino, Sr.; Wayne Disposal, Inc.; Charles Carson; Michigan Disposal, Inc., Wolverine Disposal Inc., Wolverine Disposal Detroit, Inc., Sam Cusenza, Joseph Valentini; Charles Carson; Michigan Disposal, Inc.; and Walter Tomyn. Other parties before the trial court were Darralyn Bowers, and Charles Beckham.

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PETITION OF THE CITY OF DETROIT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, City of Detroit, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 27, 1989, which reversed the district court's dismissal of respondents' complaint. The Sixth Circuit denied petitioner's petition for rehearing and suggestion for rehearing *en banc* on April 19,1989.

OPINIONS BELOW

The opinion of the court of appeals (A-1) is reported at 866 F.2d 839. The opinion of the Court of Appeals denying petition for rehearing and suggestion for rehearing *en banc* (A28) is unreported. The opinion of the district court dismissing the complaint pursuant to Fed. R. Civ. P. 12(b)(6) (A42) is reported at 620 F. Supp. 1399. The opinion of the district court denying respondents' motion to alter judgment (A31) is reported at 628 F. Supp. 610.[1]

JURISDICTION

The opinion of the court of appeals was issued January 27, 1989. The court of appeals denied petitioner's petition for rehearing and suggestion for rehearing *en banc* on April 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Respondents allege violations of the Sherman Antitrust Act, 15 U.S.C. §§-7 (1973 and Supp. 1983) and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 (Supp. 1983) ("RICO") against Petitioner City of Detroit. The relevant portions of these acts are reprinted at A54.

STATEMENT OF THE CASE

The events of this controversy arose out of the contracting for the removal and disposal of sludge for Petitioner City of Detroit's Water and Sewage Department ("DWSD"). Respondents allege that various Petitioners secured contracts

[1] In its opinion denying respondents' motion to alter judgment, the district court referred to its prior order of dismissal as an order granting summary judgment. A31; 28 F. Supp. at 611. The district court did not explain why it did so.

for the removal of sludge and sewage from the Detroit Waste Treatment Plant ("DWWTP") through a plan that included bribery of a city department head and mail fraud. Sludge is one of the by-products of sewage after it has been processed. Respondents Oakland County and Macomb County are counties in the Detroit metropolitan area that purchased water and sewerage services for their municipalities and residents from the City of Detroit. The Counties claim these alleged activities increased the cost of sewerage disposal. (R.1, 119: Complaint Paragraph 19, 20, 27, 29, 34, 41, 43). The Counties, each of which operate as sewerage disposal districts that contract for sewerage disposal with the DWWTP, allege injury to their "property and business" by reason of the increased costs of sludge removal by the DWWTP. (R.1, 119: Complaint Paragraph 49, 53, 69, 76, 83, 86). Macomb County has been merely adopting the pleadings of Oakland County without further describing its particular factual situation. We will, therefore, refer to them jointly as "the Counties" since they were treated so by the trial and appellate courts.

The Counties are the managing agents of sewerage disposal districts on behalf of the municipalities and end users. They receive a bill for sewerage service from the City of Detroit and pay that bill out of their separate sewerage funds (hereinafter Funds). (R.351: Affidavit in Support of Motion to Alter Judgment, ¶16b). In order to replenish the Funds, the Counties then bill the municipalities the cost of the Detroit bill plus an additional cost for the Counties' maintenance of their sewerage system. (R.1, 119: Complaint Paragraph 19, 20). Any shortage that occurs is made up by the municipalities and ultimately the end users. The Counties do not use any of their funds to make up a shortage. If a municipality does not pay, then Detroit is shorted in its payment. The Counties do not use any of their funds to pay when a municipality refuses to pay. Similarly, the Counties do not make a profit or realize any gain from the Funds that they manage. They

merely pass money from the municipalities and end users to the City of Detroit. The Counties' position is that of a "conduit" of funds, as they have so admitted in a prior case. See *County of Oakland v City of Berkley*, 742 F.2d 289 (6th Cir. 1984).

This conduit status is further verified by the affidavit of the Chief Deputy Drain Commissioner of Oakland County, Robert H. Fredricks II which was submitted by the Counties in support of their Motion to Alter Judgment. The method of collection and payment of sewerage funds by the Counties is as follows:

> Regardless of the method of calculation, the County's collection of and administration of money from the municipalities follows procedures established by the Municipal Finance Officers Association as prescribed by the Michigan State Treasurer (See Mich. Comp. L. Ann. 141.421), which require the use of an enterprise fund method. Oakland, therefore, collects the sewage treatment charges which have been billed to the municipalities and deposits such receipts with the County Treasurer in the County's name. Importantly, the County maintains separate, segregated accounts ("Funds") which reflect the receipts collected for each sewer district. Oakland administers those Funds and pays Detroit out of those funds without regard to whether the municipalities pay in full or on time. Any recovery by Oakland in this litigation will be credited to the Funds.
>
> * * *
>
> In summary, the County Treasurer obtains the necessary funds to pay Detroit from bills sent by the Districts to the municipalities, and the municipalities in turn obtain their funds by bills sent to the end users. The sewer accounts, and from those accounts the municipalities pay the County Treasurer, who maintains segregated Funds for each of the Districts. As such, the municipalities "pass

through" sewage treatment costs directly to the users.

(R.351: Affidavit §§ 16(b), 24.)

Petitioner, along with the other Defendants, filed a Motion to Dismiss, pursuant to FRCP 12(b)(6) which was granted on October 31, 1985; (620 F. Supp. 1399 A42.) The Counties brought a Motion to Alter Judgment which was denied on February 5, 1986, (628 F. Supp. 610 A31.) The trial court concluded that the Counties were a mere conduit for payments to Detroit by the municipalities and end users and therefore had no standing to sue. On January 27, 1989, a panel of the Sixth Circuit Court of Appeals reversed the trial court's dismissal. (866 F.2d 939 Al.) On April 19, 1989, the panel denied the Defendants' petitions for *en banc* rehearing. (A28.)

On February 2, 1986, the townships of Plymouth and Canton filed suit in District Court against all named Defendants in this action. With the exception of one additional count for breach of contract, the township suit is virtually identical to that brought by the Counties. Counsel for the Counties also represents a class action on behalf of the end users.[2]

REASONS FOR GRANTING THE PETITION

Petitioner seeks review of three questions of law on which the Court of Appeals departed seriously from prior decisions of this Court. One of the questions also reflects a conflict within the Circuits. This case presents important and recurring questions about standing under Article III, Section 2 of

[2] *County of Oakland, Alice Schoeboltz, David Snider, et. al v Charles Beckham, et. al,* No. 86-CV74656 DT (E.D. Mich.) is the class action and *Charter Township of Canton, et. al v City of Detroit, et. al,* No. 86-CV-70642 DT (E.D. Mich.) is the case brought by the municipalities. Both cases are stayed pending this appeal.

the Constitution, the Clayton Act and RICO in the following manner:

1. The Court of Appeals granted constitutional standing to a party who could show no injury in fact, because it never absorbed or was responsible for the excessive charges it claims as damages. This directly conflicts with prior decisions of this Court which require an injury in fact before standing can be conferred.

2. The Court of Appeals granted standing to Respondents on both the anti-trust and RICO claims even though Respondents had passed on all alleged overcharges to the municipalities and end users pursuant to a statutorily mandated cost plus contract. This decision is in conflict with a prior decision of this Court and creates a conflict among the Circuits.

This Court should grant review to correct the panel's errors and resolve the conflicts among the Circuits on these important issues of federal law.

ARGUMENT

I. THE COUNTIES CANNOT SHOW THE INJURY IN FACT REQUIRED FOR CONSTITUTIONAL STANDING.

A. The Counties have passed on any alleged overcharges.

The Sixth Circuit improperly ruled that the Counties had constitutional standing to sue. Article III Section 2 of the United States Constitution (A54) requires that a party show an "injury in fact" before standing can be acquired.

In the instant case the Counties can show no such injury. The Counties' pleadings show that they are a managing agent for the sewerage Funds and merely pass the charges and the payments back and forth between Detroit and the municipalities. The Court of Appeals assumed "that any and all over charges were passed on to the counties' own customers, the

municipalities". (A12). The panel also noted that the Funds were "strictly non-profit" and that any recovery would be automatically passed back to the municipalities. (nt. 6 A24).

These facts clearly show that the Counties were a mere conduit for the Funds. If Detroit charged $10 for sewage handling, the Counties billed the municipalities $10. If Detroit raised the charge to $11, the Counties billed the municipalities $11. The municipalities would then pay the bill and the monies would be transferred through the Funds to Detroit. The Counties did not make a profit off the funds. More importantly however, the pleadings and evidence show that the Counties were not responsible for any shortfall in the funds. Thus, if a municipality failed to pay the Funds it is Detroit who would get shorted, not the Counties. See *County of Oakland vs. City of Berkley*, 742 F.2d 289 (6th Cir. 1984).[3]

The Court of Appeals stated that "Detroit is entitled to be paid by Oakland County . . . whether or not the municipalities pay the County on time or in full." (A6). The panel also concluded that "[t]he plaintiff counties were liable for Detroit's allegedly inflated sewerage charges." (A15.) By "liability" the Court obviously means that Respondents are the entity that produces a check for payment, albeit a check drawn on the funds of others. This view is supported by the facts and the pleadings. While it is true that it is the Counties, not the municipalities or end users, that are the entities that present a check to Detroit for sewerage services, that check

[3] In *County of Oakland v. City of Berkley, supra*, this Court held that "Oakland County is a mere conduit for sewer charges owed to the City of Detroit." *Id.* at 292. It Further held that "the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewerage disposal . . ." *Id.* at 296. This holding was based on the affirmative allegations of Oakland County in its pleadings and briefs. In those briefs, the County called itself "the conduit or managing agent for the members of the system" and freely admitted that it would not be responsible for any shortage of the funds owed to Detroit.

is drawn only on the Funds. The Counties do not contribute any monies to these Funds on behalf of the municipalities or end users. The Court recognized this when it stated that "any and all overcharges were passed on to the Counties' own customers, the municipalities." (A29.)

The Michigan statutes that dictate the Counties' relationship with the municipalities state that rates from the Counties to the municipalities are set equal to the charges from Detroit, to wit:

> Any charges specified in any such [municipality-county] contract shall be subject to increase by such county at any time, if necessary, in order to provide funds to meet the obligations of the [sewerage] project.

MICH. COMP. LAWS § 123.745 ((1967) and Supp. 1989).

Clearly, under these facts the Counties do not have any interest in the Funds, but are merely the bank for the municipalities. If the Counties do not contribute to the Funds on behalf of the municipalities and end users, and do not make a profit off of any payments made by them, then the Counties cannot be damaged if the municipalities and end users are overcharged and have to contribute more money to the Fund.

B. Respondents' status as a conduit does not confer standing

Merely being a "bank", "managing agent" or "conduit" of funds does not entitle a party to standing. A party must have "threatened injury as a result of the punitively illegal conduct of the defendant." *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The Counties cannot show that they have or could have been out of pocket for any alleged overcharges.

Although injury in fact does not have to be an economic interest, *Association of Data Processing Service Organizations v Camp*, 397 U.S. 150 (1969), it must be to the parties' *own* interest, *Valley Forge, supra*, and must be more than a "special

interest". *Sierra Club v Morton,* 405 U.S. 727 (1972). The Counties cannot show that they had any interest that was injured by any alleged overcharges to the municipalities and end users. They therefore cannot show Article III standing.

The Court of Appeals felt that the Counties had standing because they were the entities that entered into a contract with Detroit, and were therefore not an agent of the municipalities in the legal sense. This argument elevates form over substance and is factually incorrect. As argued above, the Counties are in the position of a principal, but clearly are not responsible for payment.

The Court of Appeals found that the Counties are a "conduit" in an economic sense, but not in a legal sense. (A12). The pass on defense, as discussed below, is a recognition of this economic reality. It recognizes that even though a direct purchaser may be legally entitled to sue, if it economically passes on its injury, it then loses its standing. The Court of Appeals is again elevating legal form over economic and logical substance with this argument.

The Court of Appeals correctly recognized that a buyer who is induced to pay an unlawfully inflated price for goods or services suffers an actual injury. *Chattanooga Foundry and Pipe Works v City of Atlanta,* 203 U.S. 390 (1906). The Court failed to recognize, however, that the Counties have neither paid for nor received any of the sewerage services used by the municipalities or end users. They merely wrote a check out of an account that consisted of monies paid in by other parties in return for services used by those other parties. *Chattanooga* requires that a parties' "property be diminished". The Counties have made no contributions to the Funds on behalf of the municipalities and end users and cannot lay claim to those Funds as their "property".

The cases relied on by the Court of Appeals, *Southern Pacific Co. v Darnell-Taenzer Lumber Co.,* 245 U.S. 531 (1918), *Adams v Mills,* 286 U.S. 397 (1932) and *Bacchus*

Imports v Diaz, 468 U.S. 263 (1984), are all distinguishable from the case at bar. In these cases, although the Plaintiff had passed on any overcharges to its customer, it was still personally liable for the full amount due. This is not true in the instant case. Here the Counties merely pass the payments along and are not personally responsible if the payment is inadequate.

C. Respondents cannot show an injury to themselves

The Court of Appeals also found Article III standing based on a supposed injury to the Counties' "business". The panel held that the Counties could have lost potential residents or businesses to other areas in the nation as a result of excessive sewerage rates. Not only is this claim incredibly speculative, it is not even a claim advanced by the Counties in their Complaint. The Counties are suing for damage to the Funds built up by the municipalities and end users. No allegations have been made regarding loss of residents. While it is true that there are other counties in the United States for businesses to locate in, it is also true that the Tri-County Metropolitan Detroit Area is the industrial base of the State of Michigan. It is entirely speculative that an increase in sewerage rates would keep businesses away from the prime industrial property in the State. To confer standing on the basis of such a tenuous possibility in the face of other mitigating factors is improper.

II. THE COUNTIES CANNOT SHOW ANTITRUST STANDING BECAUSE THEY PASSED ON ANY DAMAGES.

Even if the Court of Appeals was correct in holding that the Counties were somehow injured when they tendered a check drawn on the Funds to pay Detroit for sewerage charges, the Counties would still be unable to show proper standing for the antitrust counts because they have passed on any damages. The Court of Appeals erred when it held that Petitioner could not assert a passing-on defense and that the

Counties had standing to sue even if they "were successful in passing on all costs allocated to them".

A. *Hanover Shoe* and *Illinois Brick* recognize the cost-plus exception

The pass-on defense is a viable defense that was first recognized in *Hanover Shoes Inc. v United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In *Hanover Shoe*, the Court rejected the argument that a Plaintiff who resold a product for which it had paid an inflated price did not suffer an injury because it had fully passed on the overcharge to the next purchaser. The Court found that there were many factors that normally influenced a company's pricing decisions such as supply costs, general economic conditions, labor supply etc. These factors made it too difficult to determine how much of the overcharge was absorbed by the initial purchaser and how much was passed on. The *Hanover Shoe* Court however did recognize that exceptions to the general rule did exist:

> We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present.

Passing-on was next examined by this Court in *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977). Again, the Court recognized exceptions to the general rule as enunciated in *Hanover Shoe*. Referring to its decision in *Hanover Shoe*, the Court stated:

> [T]he court recognized an exception for pre-existing cost-plus contracts, which "mak[e] it *easy to prove* that [the direct purchaser] has not been damaged." 392 U.S., at 494, 20 L Ed 2d 1231, 88 S Ct 2224. (Emphasis added.) The amount of the stake that the customers of the direct purchaser have in a

> lawsuit against the overcharger is not likely to depend on whether they buy under a cost-plus contract or in a competitive market, *but the court allowed a pass-on defense in the former situation because the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser.* See Note, The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine, 46 So Cal L Rev 98, 108 (1972).

Id. at 732, n. 12. (emphasis added)

The *Illinois Brick* Court clearly recognized the "pre-existing cost-plus contract" exception. The reason is simple. There is no complex economic analysis necessary in deciding the apportionment of the overcharge. The *entire* overcharge is passed on to the indirect purchaser and the direct purchaser has suffered *no injury whatsover.* There is no need to study or estimate elasticities to perform market surveys or complex econometric studies. If the entire overcharge is passed on, the question of apportionment is answered quickly and easily.

This exception was also recognized by several circuits. In *Jewish Hospital Association v Stewart Mechanical Enterprises, Inc.* 628 F.2d 971 (6th Cir. 1980), the Court followed *Hanover Shoe* and *Illinois Brick* and recognized the rationale of the general rule that normally barred passing on:

> [D]etermining how much of the overcharge actually had been passed through at each level would be nearly impossible. Even under the simplifying assumptions of economic theory, calculating the amount of the pass-through at any level would involve resolving conflicting expert opinions as to the elasticity of demand for the particular product. Furthermore, because pricing decisions in the real world of imperfectly competitive markets often do not fit an economist's model, theoretical calculations of the amount passed through would only approximate reality.

Jewish Hospital, 628 F.2d at 974.

However, this Court also recognized the "pre-existing cost-plus contract" exception.

> Pre-existing cost-plus contracts are outside the rationale of the passing on bar . . . because passing on the entire amount of the overcharge cannot decrease its sales, the direct purchase has no incentive to absorb any of the overcharge itself. This being so, the problem of tracing the overcharge to the indirect purchaser is eliminated.

Id. at 976.

Although the *Jewish Hospital* Court did not find the exception applicable in its case because the contract was not pre-existing, there can be no doubt the Court approved of the doctrine of allowing passing on where there was a cost-plus contract.

The Seventh Circuit has also recognized the exception in *State of Illinois ex rel Hartigan v Panhandle Eastern Pipeline Co.*, 852 F.2d 891 (7th Cir. 1988) (en banc) *cert. denied* ___ U.S.___, 102 L Ed.2d 573 (1988). This case allowed the use of a pass on defense where a public utility passed on its costs to its customers. Unlike the Court of Appeals in this case, *Panhandle* rejected the requirement of a "fixed quantity". They found that in the case of a public utility monopoly, where there was a statutorily imposed requirements contract, a fixed quantity was "implicit in the cost-plus exception rather than an independent requirement for invoking". (852 at 898.)

Panhandle is a well reasoned decision that is in harmony with the facts of the instant case and should be followed. The requirement of a "fixed amount" in a cost plus contract does not logically apply to the case at bar. Cases applying that criteria, such as *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286 (10th Cir. 1989), do so because they cannot simply apportion damages because of a possible decreased demand due to the higher price. The *Tight Sands* Court felt that if a Plaintiff had a cost plus contract that did not contain

a fixed amount, the Plaintiff could lose profits by customers buying less due to the high price.

This reasoning does not apply to the case at bar because the Counties do not make a profit from the funds. Thus, even if the municipalities and end users decided to purchase less sewerage services due to the price, it would not injure the Counties. It makes no difference to the Counties if the municipalities purchase 10 units or 20, nor does it matter to them if the Funds contain $10 or $10 million dollars, since they are merely the Funds' managers.

As a practical matter, it would be very difficult, if not impossible for there to be any decrease in demand for sewerage services. Detroit's system is the only legal source of sewage disposal in its service area. Consumers have no alternative sources. Conservation in this area is unlikely in that there are currently no viable alternatives to the current method of sewage disposal.

B. Petitioner should be allowed to use the pass-on defense

In the instant case, as argued above, the Court of Appeals has already held that the Counties pass on any alleged damages. The rates imposed by the Counties and the municipalities are also subject to a regulatory pass on provision like that described in *Panhandle*. As stated above, Michigan Public Act No. 185, Mich. Comp. Laws §§ 123.731 *et seq.* (1967 & Supp. 1988) contains a comprehensive legislative scheme for the regulation of water and sewerage charges. Section 15 of the Act, Mich. Comp. Laws § 123.745, authorizes municipalities to contract with the Counties for sewerage services and the Counties to contract in turn with Detroit for sewerage services. The Act specifically contemplates that costs incurred by the Counties will be passed through to the municipalities:

> Any charges specified in any such [municipality-county] contract shall be subject to increase by such county at any time, if necessary, in order to provide funds to meet the obligations of the [sewerage] project.

Mich. Comp. Laws § 123.745. A55.

As discussed above, the Counties cannot be injured by any decreased demand because they are non-profit. As the *Panhandle* case shows, it is appropriate to apply the pass on defense in cases like the one at bar. By refusing to allow Petitioner's pass-on defense, the Court of Appeals has improperly created a split in the Circuits and has not followed the rulings of this Court.

C. The Court of Appeals has misapplied antitrust standing criteria

The Court of Appeals in the instant case held that the real injury in this case was the excessive price. Petitioners agree, but are forced to add the question, "Who pays the price?" In this case, it is not the Counties who pay, but the municipalities and ultimately, the end users.[5]

The Court of Appeals seems to have an abhorrence of a suit by the end users. The panel feels that there will be no incentive to sue, that suits will be incredibly complex and that only the attorneys will receive any benefits. None of these issues are unusual for an antitrust action. Nor are they proper issues upon which to confer standing. In *Associated General Contractors of California, Inc. v California State Council of Carpenters,* 459 U.S. 519, 535 n. 31 (1983), the Court set forth five factors which support a finding of antitrust standing: (1) the causal connection between the antitrust violation and harm to the Plaintiff and whether that harm was intended to be caused; (2) the nature of the Plaintiff's alleged injury, including the status of the Plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. *Id.* at 536-544.

[5] In essence, the Counties are seeking to bring a *parens patriae* suit on behalf of the end users. Section 4c of the Clayton Act 15 USC § 15c allows only state attorney generals to bring such suits.

As discussed above, there is no connection between the antitrust injury and the Respondents. They cannot show an injury, let alone a direct injury, because they are merely a conduit. The potential for duplicative recovery is high in that both municipalities and end users have filed suit. These parties are certainly more direct and actual victims. Complexity is not really an issue because even if the Counties are awarded damages which go into the Funds, there will have to be an accounting to the individual users if any sort of rebate or bill reduction is to be given. The Court clearly failed to follow this Courts' ruling in *Associated General* when it conferred standing in the instant case.

III. THE COUNTIES HAVE NO RICO STANDING

Petitioner asserts that the arguments made above in reference to Respondents not having anti-trust standing apply equally as well to deny Respondents standing under RICO 18 USC 1964 (c). If Respondents have passed on their alleged damages pursuant to a statutorily imposed cost plus contract, then they can not show a direct injury. However, the RICO act itself mandates that Plaintiffs in Respondents' position not be allowed to bring suit under RICO for additional reasons other than those set forth in the antitrust arguments above.

A. RICO has a purpose and an emphasis that is different from the Federal Antitrust Laws.

Although RICO was initially drafted as a supplement to the anti-trust laws, Congress later chose to enact a separate and distinct RICO statute. The existent antitrust laws were not seen as adequate remedies to the legitimate businessman injured by organized crime, and RICO was enacted to fill the gap. 115 Congr. Rec. 6993 (1969) (Statement of Senator Hruska).

The purpose of RICO was to compensate the crime victim, not merely to protect competition as is done by the anti-trust

laws. The American Bar Association Section of Antitrust Law, in its report to a Senate subcommittee stated:

> Some activities of organized crime in legitimate business may or may not be subject to the antitrust laws. Thus, some extortion tactics and business takeovers by organized crime might not be reached under the antitrust laws, *particularly if they affected only the victimized business rather than in a lessening of competition in an entire line of commerce.*

Measures Relating to Organized Crime, Hearings on S. 30, *et al.* before the Subcommittee on Criminal Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 556-57 (1969).

Thus, the requirements of RICO standing have differed from that of the antitrust laws. No "racketeering injury", similar to the "antitrust injury" requirement for standing under federal antitrust laws, is required in RICO. *Sedima S.P.R.L. v Imrex Co.*, 473 U.S. 479 (1985). In *Schacht v Brown*, 711 F.2d 1343 (7th Cir.) *cert. denied* 464 U.S. 1002 (1983), the Seventh Circuit held that interpreting RICO only in light of the antitrust laws would "undermine that broad mission of RICO by engrafting onto civil provisions a competitive injury requirement . . . The structural similarity of the RICO civil damages apparatus to that contained in the antitrust laws does not persuade us otherwise." *Id.* at 1358. The Court felt that the references to the antitrust laws were attempts to justify the treble damages action as a deterrent device to organized crime, but were not an indication that the objectives of the two acts were the same. *Id.*

B. RICO standing requires a direct injury

RICO has favored standing by those who suffered an actual injury. This is in direct contrast to the antitrust laws which allow only the direct purchaser, with some exceptions as discussed above, to sue even though there may be other injured parties. This antitrust standing has been rejected in

RICO cases. In *Sedima, supra,* the Court concluded from the legislature history of RICO that there is:

> no warrant in the language or history of the [RICO] statute for denying recovery thereunder to the *direct victims* of the [racketeering] activity . . . while preserving it for the indirect.

473 U.S. at 497 n.15 (citations omitted) (emphasis added).

A majority of the Court rejected the dissenters' contention that victims of racketeering, such as customers of a mob-infiltrated bank (who suffered actual monetary injury) should be denied recovery under RICO in favor of investors in the bank or competing banks. *See Id.* at 522 (Marshall, J., dissenting).

The federal circuits have also fashioned numerous tests for standing, all of which place primary emphasis on actual injury, rather than linking standing with some overall policy of protecting competition. Some circuits characterize the test as one of direct injury flowing from racketeering activities, *Rand v Anaconda-Ericsson, Inc.*, 794 F.2d 843 (7th Cir. 1985), *cert. denied,* 479 U.S. 987 (1986); *Nodine v Textron, Inc.*, 819 F.2d 347, 349, (1st Cir. 1987); *Town of Kearny v Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3rd Cir. 1987); *Warren v Manufacturers National Bank of Detroit,* 759 F.2d 542 (6th Cir. 1985); *Morast v Lance,* 807 F.2d 926, 933 (11th Cir. 1987).

Other circuits describe the standing test in terms of injuries that are factually and proximately caused by racketeering, *Sperber v Boesky,* 849 F.2d 60 (2nd Cir. 1988); *Bradenberg v Siedel,* 859 F.2d 1179 (4th Cir. 1988); *Ocean Energy II, Inc., v Alexander & Alexander, Inc.*, 868 F.2d 740 (5th Cir. 1989).

C. The end users, not Respondents, have RICO standing in the instant case

This additional RICO requirement of directness of injury was not analyzed by the Sixth Circuit in the instant case.

Instead, the Court blindly applied the antitrust rule of direct purchaser standing to the RICO counts.[6] In the instant case the victims of any alleged RICO violations are clearly the end users. They are the only persons in the chain of distribution that have actually had to pay any extra money out of their pocket. To deny them standing under RICO because of antitrust standing rules would invalidate the purpose of RICO.[7]

The end users are the appropriate parties to sue not only because the Respondents have passed through any excess overcharges, but also because the end users are the actual victims of the RICO allegations. Whether or not indirect victims such as Respondents, who passed on their alleged damages have standing under RICO is a question of first impression that should be addressed by this Court.

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[6] In applying the direct purchaser rule, the Sixth Circuit failed to note that Respondents may no longer be considered direct purchasers under the RICO counts. Respondents are not direct purchasers of the sludge hauling services upon which the RICO allegations rest. Sludge hauling services are sold to Detroit which then incorporates them into the total water and sewerage package, which is sold to the end users through Respondents. Respondents have been able to claim that they are direct purchasers of sludge hauling only by claiming a co-conspirator exception to the direct purchase rule in regard to the City of Detroit. However that exception is no longer available in that a municipality cannot conspire under RICO. *Massey v Oklahoma City*, 643 F.Supp. 81 (W.D., Okla 1986); *In re CitiSource, Inc. Securities Litigation*, 694 F.Supp. 1069 (S.D., N.Y.) 1988); Thacker Eng'g Inc. v Chicago Housing Authority, ___ F.Supp. ___(N.D. Ill. 1988); *Albanese, et. al v City Federal Savings and Loan Assoc., et. al*, ___ F.Supp. ___ (D.C. N.J. 1989).

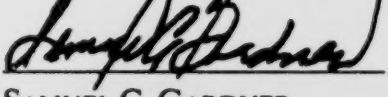
[7] One commentator concluded from the legislative history of RICO that "any suggestion that RICO actions be limited to antitrust-type limitations—'competitive,' 'commercial,' or 'direct/indirect'—flies in the face of the very considerations that led to the drafting of RICO as a separate statute from the antitrust statutes that are so limited." Blakey, *The RICO Civil Fraud Action: Reflections on Bennett v Berg*, 58 Notre Dame L. Rev. 237, 255 n.52 (1982).

CONCLUSION

WHEREFORE, Petitioner requests that this Honorable Court grant certiorari on this matter.

Respectfully submitted,

BELL AND GARDNER, P.C.

BY: 

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Appendix

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE COUNTY OF OAKLAND,
Plaintiff-Appellant,
Cross Appellee,

THE COUNTY OF MACOMB,
Intervening
Plaintiff-Appellant,
Cross Appellee,

v.

THE CITY OF DETROIT, *et al.*,
Defendants-Appellees,

NANCY ALLEVATO, MICHAEL J. FERRANTINO, SR., WAYNE DISPOSAL, INC., CHARLES CARSON, MICHIGAN DISPOSAL, INC., and WALTER TOMLYN,
Defendants-Appellees,
Cross Appellants,

COLEMAN YOUNG, *et al.*,
Defendants-Appellees,
Cross Appellants.

NOS.
86-1200/1217/1218
86-1266/1267/1268
86-1303/1334

Before: MERRITT and NELSON, Circuit Judges; and CONTIE, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded for further proceedings consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER
OF THE COURT

LEONARD GREEN

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 86-1200/1217/18/66/67/68/1303/34
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE COUNTY OF OAKLAND,
Plaintiff-Appellant, Cross Appellee,

and

THE COUNTY OF MACOMB,
Intervening Plaintiff-Appellant, Cross Appellee,

v.

THE CITY OF DETROIT, *et al.*,
Defendants-Appellees,

NANCY ALLEVATO, MICHAEL J. FERRANTINO, SR., WAYNE DISPOSAL, INC., CHARLES CARSON, MICHIGAN DISPOSAL, INC., and WALTER TOMLYN,
Defendants-Appellees, Cross Appellants,

and

COLEMAN YOUNG, *et al.*,
Defendants-Appellees, Cross Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed January 27, 1989

Before: MERRITT and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge, Oakland County, Michigan, brought a federal antitrust and RICO action against the City of Detroit and its mayor, among others, on account of alleged overchanges for sewerage services. Macomb County, Michigan, was allowed to intervene in the action as an additional party plaintiff.

The prices paid for the sewerage services were a function of the costs Detroit incurred in providing them. The plaintiff counties claimed that these costs were excessive. Detroit allegedly having procured sludge disposal services at inflated prices set in a price-fixing conspiracy, with enough padding to cover illegal kickbacks to city personnel. The complaints also alleged that the counties, as opposed to the City of Detroit, collected sewerage fees from municipalities located within sewage disposal districts operated by the counties, and the complaints alleged that Detroit was paid not by the local municipalities, but by the counties.

The district court dismissed the complaints on the ground that the counties lacked standing to sue. The counties were mere intermediaries, the court concluded, and the municipalities bore the full burden of the alleged overcharges when the municipalities paid the bills submitted to them by the counties. The counties thus could not show that they had suffered the sort of "injury in fact" necessary to confer standing under the Constitution, the district court held, just as they could not show that they had been injured in their "business or property" within the meaning of that phrase as used in the statutes on which suit was brought.

Both countries have appealed the dismissal of their complaints, and Oakland County has appealed an order denying

its motion to vacate certain protective orders entered in related criminal proceedings. The defendants have cross-appealed an order denying, in part, their motion to quash a subpoena for certain electronic surveillance materials.

Because we think that the plaintiff counties did allege injuries sufficient to give them standing to sue, we shall reverse the order of dismissal and direct that the complaints be reinstated. We think it would be inadvisable for us to try to resolve the various discovery issues at this stage of the litigation.

I

In 1977 the United States sued the City of Detroit in federal district court, alleging that Detroit was disposing of sewage in violation of federal environmental laws and regulations.[1] A consent judgment was entered, but the United States became dissatisfied with the pace at which Detroit was moving toward compliance. In March of 1979, following issuance of a show cause order, the court made Coleman A. Young, Mayor of the City of Detroit, the "administrator" of the wastewater treatment plant operated by the Detroit Water and Sewerage Department.

Invoking "the broad range of equitable powers available to this court to enforce and effectuate its orders and judgments," the district court transferred all functions relating to operation of the treatment plan to Mayor/Administrator Young, divesting Detroit's Board of Water Commissioners and the city water and sewerage department of authority vested in

[1] In the last nine years there have been no fewer than 14 published federal court opinions on matters arising out of the operation of Detroit's sewer system. The reader interested in the background is referred to *United States v. Bowers*, 828 F.2d 1169 (6th Cir. 1987), *cert. denied*, ___U.S.___ 108 S. Ct. 1731 (1988); *City of Detroit v. State of Michigan*; 803 F.2d 1411 (6th Cir. 1986); and *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984).

them under the city charter. The transfer of functions to Mr. Young was accompanied by a grant of what the order characterized as "extraordinary" powers, including the power to waive competitive bidding requirements in awarding contracts and the power to operate "without the necessity of any actions on the part of the Common Council of the City of Detroit. . . ." *United States v. City of Detroit*, 476 F.Supp.512, 515 and 520 (E.D. Mich 1979). The present appeal, like that in *County of Oakland v. City of Berkley*, 742 F.2d 289 (1984), draws in issue neither the validity of the court's appointment of Mr.Young as administrator nor the validity of the court's decision to vest in him powers which the city charter placed elsewhere. *Id.* at 292.

Acting in his capacity as administrator, Mr. Young entered into contracts for the hauling and landfill disposal of sludge and scum from the city's wastewater treatment plant. Various improprieties in the formation of these contracts allegedly increased the city's costs and its charges to the counties; those improprieties form the basis for the counties' action against the city, Mr. Young, the sludge haulers, and certain persons associated with them.

* * *

The Detroit sewage disposal system serves not only the city itself, but the outlying counties of Oakland and Macomb. Oakland County, according to the affidavit of its chief deputy drain commissioner, operates three sewage disposal districts embracing some 35 municipalities. The municipalities have individual sewer systems that are connected to interceptor sewers built and operated by the county. The county sewer lines are connected, in turn, to the Detroit system. Detroit treats the sewage at its wastewater treatment plant and arranges for disposal of the residual sludge and other byproducts of the treatment process. Detroit bills Oakland County for the services provided by the city, and Oakland County bills

the local municipalities. Detroit is entitled to be paid by Oakland County, as the affidavit establishes, whether or not the municipalities pay the county on time or in full.

The fees Oakland County charges the various municipalities within its three sewer districts are based upon the county's costs. These include costs incurred by the county under its contractual arrangements with Detroit, costs incurred in building, operating and maintaining the county system, and an allowance for reserves.

The allocation of costs among the municipalities is, for a number of reasons, less precise than it might be. The character of the information used in the allocation process varies widely from community to community, for one thing. In some areas there are no individual user meters and no master meters that accurately record the flow of sewage. Thus in the Clinton-Oakland district the allocation is based on estimated usage multiplied by a flat rate, adjusted by a "unit assignment factor." In the Evergreen-Farmington district the allocation for some municipalities is based on master water meters, while for others it is based on totals compiled from individual water meter readings, adjusted by a multiplier. Some Evergreen-Farmington communities have a separate storm water charge, while others do not. Some municipalities lie within two districts, while others lie wholly in one.

In addition to operating connecting sewers that link local municipal systems with the Detroit system, Oakland County is directly responsible for operation of the local sewer systems in four communities. The County is also a consumer of sewer services; and Oakland County buildings are connected to local municipal sewer systems in the communities where the buildings are located, and Oakland County receives and pays regular sewer bills like any other end-user in those communities.

The municipalities bill their individual residential and commercial customers under a procedure similar to Oakland County's. Each community that operates its own local system allocates the county's charges among its customers, after adding an amount sufficient to cover sewer expenses incurred at the local level.[2]

* * *

Turning to the specific events out of which the counties' claims arise, the story begins in 1979, when Detroit was seeking new ways of disposing of sludge and scum from its wastewater treatment plant. On May 1 of that year Detroit signed a sludge disposal contract with defendant Michigan Disposal, a sludge-hauling firm owned by the late Michael Ferrantino. Mr. Ferrantino's estate is a defendant in this action. The contract, which covered only part of the output of the plant, was originally entered into for a term ending on June 30, 1983; the term was later extended to June 30, 1985.

The sludge handled under the Michigan Disposal contract was taken to a landfill owned by Wayne Disposal, another firm controlled by Ferrantino. Michigan Disposal paid Wayne Disposal for the right to use its landfill.

In 1980 Michigan Disposal made an unsolicited proposal for a second sludge-hauling contract, covering the balance of the output of Detroit's plant. The city rejected the proposal, believing that total dependence on a single sludge hauler would be bad policy. Mr. Ferrantino decided to try skinning the cat another way. With defendant Darralyn Bowers, who was a close friend of Mayor Young, Ferrantino contrived a

[2] Macomb County has not provided details similar to those furnished by Oakland County. We are told only that Macomb allocates Detroit's charges proportionately, based on meter readings, and adds a fixed markup. Macomb operates no facilities of its own. To the extent necessary we shall assume, as did the district court, that Macomb County's operations are otherwise similar to those of Oakland County. This does not foreclose the district court from treating the claims of the two counties differently should the facts adduced hereafter warrant it.

scheme to procure the second sludge-hauling contract for a front company known as Vista Disposal. Also involved in the scheme were defendant Tomlyn, a Michigan Disposal employee, and defendants Cusenza and Valentini. The latter two individuals were employees of Wolverine Disposal, another firm partly owned by Mr. Ferrantino.

Vista Disposal, the front company, was held out as the sole proprietorship of one Jerry Owens, a man with no previous experience in the sludge hauling industry. Vista submitted a proposal to build a sludge holding pad where sludge could be stabilized and held for up to 12 hours at the treatment plant before being hauled away. The proposal included false statements about Vista's ownership, Owens' experience, and other matters. Mayor Young used his extraordinary court-conferred powers to award the contract to Vista without competitive bidding and without Common Council approval. A subsequent FBI investigation of the Vista scheme led to several of the present defendants being prosecuted and ultimately convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Hobbs Act, and the federal mail fraud statute.[3]

* * *

Oakland County, soon to be joined by Macomb County, filed the instant civil action the wake of the criminal investigations. The counties alleged in their complaints that the

[3] Given the nature of their crimes and the element in which these dabblers in sludge and scum worked, Shakespeare could almost have been speaking for the convicted defendants when he wrote, in Sonnet CXI,

> "O, for my sake do you with Fortune chide,
> The guilty goddess of my harmful deeds,
> That did not better for my life provide,
> Than public means, which public manners breeds.
> Thence comes it that my name receives a brand;
> And almost thence my nature is subdu'd
> To what it works in, like the dyer's hand. . . ."

defendants had conspired to violate the antitrust and racketeering laws, had excluded competition, had illegally fixed the price of sludge hauling, had monopolized the sludge hauling industry, and had imposed illegal overcharges. Relying on § 4 of the Clayton Act (15 U.S.C. § 15) and the cognate provision in RICO, 18 U.S.C. § 1964(c), the counties sought to recover their damages three-fold, along with costs and attorney fees. Each count of each complaint contained a paragraph alleging injury in terms comparable to those in the following exemplar, taken from paragraph 49 of the Oakland County complaint:

> "Plaintiff has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of [Detroit Wastewater Treatment Plant] sludge caused by Defendants' unlawful conduct."

Without answering the complaints, the defendants moved for dismissal under Rule 12(b)(6), Fed. R. Civ. P. In an opinion reported at 620 F.Supp. 1399, the district court granted the motions. Subsequent motions to alter judgment were denied (see opinion reported at 628 F.Supp. 610), and the counties have appealed. Separate appeals on discovery matters have been consolidated with the appeals relating to the dismissal of the action.

II

The district court, as noted above, dismissed the plaintiff counties' complaints for lack of standing. The burden of any unlawful cost increment fell on the municipalities or the ultimate consumers, the court reasoned, and although the

counties did pay a portion of the allegedly excessive costs as customers of the municipalities, the counties were not suing as customers of the municipalities, but as administrators of the "enterprise funds" through which the county sewage systems were operated. In the latter capacity, said the district court, the counties simply acted as collection agencies for the City of Detroit, in effect, and not as buyers of sewerage services on their own account. 620 F.Supp. at 1402-03; 628 F.Supp. at 613. The counties had not themselves suffered any injury in fact, the court concluded, and thus had no standing to sue. It seems to us, however, that the counties must be treated as buyers on their own account. As such the counties did have standing, we think, both as a matter of constitutional law and as a matter of statutory law.

Implicit in the district court's suggestion that it was not the counties which purchased the services from Detroit is the notion that the counties were acting merely as agents, rather than as principals—for the court expressly acknowledged that Oakland County, at least, did actually sign contracts with Detroit. 620 F.Supp. at 1400. *Cf.* 628 F.Supp. at 611. But the complaints—which must be accepted as true for present purposes—allege that it was the *counties*, not the municipalities acting through the counties as agents, that were the contracting parties. These allegations have been verified, in the case of Oakland County, by an uncontradicted affidavit attesting to the fact that "Oakland County has entered into three separate contracts with the City of Detroit for the disposal and treatment of the sewage flows originating within each of [the county's] three sewage disposal districts. . . ." It was the counties, not the municipalities, that were billed by Detroit, and *there has been no showing that Detroit was entitled to look to the municipalities for payment.* The counties, in our view, must be treated as direct purchasers in their own right.[4]

[4] The counties seem to argue here, as they did in the district court, that "the Counties, the municipalities, and the end users are really one party contracting with the City of Detroit." 628 F.Supp. at 613. The district court dismissed this argument as an "absurdity," and we agree. It is somewhat reminiscent of the old common law proposition that a man and his wife are one person, the husband being that person.

It is true that in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984), where we concluded that the pendent jurisdiction doctrine could be invoked in the federal government's environmental action to enable the federal court to decide a sewer charge dispute between Oakland County and the City of Madison Heights, we described Oakland County as "an intermediary only, dependent completely on payments from the municipalities to meet its obligation to Detroit." *Id.* at 292. We also said that "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for in the consent judgment." *Id.* at 296. Whether or not the last part of the quoted statement is factually correct, however,[5] our 1984 opinion made it clear that "[i]n November 1962 *Oakland County* entered into a contract with the City of Detroit by which Detroit agreed to receive and dispose of sanitary and storm sewage . . . and the *County* agreed to a schedule of payments for this service." *Id.* at 291-92 (emphasis supplied). Our opinion also made it clear that service charges were imposed on the municipalities *by the county;* it was a dispute over the amount of the *county's* charges, after all, that was before us in that case.

Our 1984 decision undoubtedly reflected an understanding that 100 percent of the charges imposed by Detroit on the

[5] In the case at bar, Defendant Young filed a brief with the district court attaching as exhibits certain contracts entered into by the City of Detroit, through its Board of Water Commisioners, and Oakland County; the contracts provide that "[t]he COUNTY shall pay the BOARD for sewage treatment and disposal service at such rates as the BOARD may establish from time to time." We have seen in these contracts no indication that the counties would be relieved of responsibility for paying Detroit to the extent that the counties might be unable to collect from the municipalities. The district court recognized in this case that a failure of the municipalities to pay "their contractual obligations to the Counties" would injure the enterprise funds maintained by the *counties*. 628 F.Supp. at 612.

county were passed on by the county to the municipalities, which would make the county a "conduit" in an economic sense. The decision did not say, however, that the county was an agent rather than a principal in the legal sense. Accordingly, in our view, Oakland County is not collaterally estopped from challenging the district court's suggestion that the counties are not actual buyers of the service sold by Detroit. The counties certainly are buyers, as we see it, and the real question presented here is whether the Constitution or the statutes foreclose the counties from coming into court if one assumes—as we do, for purposes of this opinion—that any and all overcharges were passed on to the counties' own customers, the municipalities.

A

We shall address the constitutional question first. The Constitution makes it clear that the judicial power vested in the federal courts under Section 1 of Article III extends only to "Cases" and "Controversies," U.S. Const., Art. III, § 2. A dispute in which the interest of the complaining party is purely academic does not qualify as a case or controversy in the constitutional sense; the federal courts are not empowered to decide questions posed by officious intermeddlers having no personal stake in the outcome. To satisfy the "case or controversy" requirement of the Constitution, a complaint must describe some actual or threatened injury to the complainant, must allege a causal connection between that injury and the defendant's putatively illegal conduct, and must advance some legally cognizable claim for redress. *Valley Forge Christian College v. Americans United for Separation of Church and State.* 454 U.S. 464, 472 (1982).

A buyer who is induced to pay an unlawfully inflated price for goods or services obviously suffers an actual injury—an "injury in fact," to use the common expression. As Mr.

Justice Holmes put it in discussing the antitrust complaint of a city that claimed to have been overcharged on purchases of pipe for its water mains, "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (majority opinion).

Does the injury suffered by such a person vanish if he is able to recoup the illegal overcharge by passing it on to his own customers? The answer is not difficult, at least insofar as the constitutional aspect of the question is concerned. Just such an issue was present in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), and in that case Mr. Justice Holmes—speaking this time for a unanimous Supreme Court—said in effect that the plaintiff who has subsequently passed on the overcharge to his customers is no more deprived of standing to sue than is the claimant whose loss happens to be covered by insurance. *Id.* at 534.

Presented with a similar question in *Adams v. Mills*, 286 U.S. 397 (1932), the Supreme Court (per Brandeis, J.) gave a similar answer. That case was brought by commission merchants who, as consignees of livestock shipped by rail, had been charged illegal unloading fees. The commission merchants sued to recover the unlawful charges notwithstanding that they had already reimbursed themselves out of the proceeds of the sale of the livestock, remitting to their principals only the balance remaining after deduction of the unloading fees. If the defendants exacted an unlawful charge from the plaintiffs, Mr. Justice Brandeis said in explaining why the action would lie,

> "the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer. Acceptance of the shipments would have rendered them personally liable to the carriers

> if the merchandise had been delivered without payment of the full amount lawfully due. As they would have been liable for an undercharge, they may recover for any overcharge. In contemplation of law the claim for damages arose at the time the extra charge was paid. Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers."

Id. at 407 (citations omitted).

Like the Holmes opinion, on which it relied, the Brandeis opinion rejected the argument that the plaintiffs had not been "injured" within the meaning of the applicable statute. Article III was not discussed, but the conclusion that the plaintiffs had been "injured" in the statutory sense necessarily presupposed that the injury was enough to give the plaintiffs the standing required under Article III; if the Court had not believed there was a case or controversy, it could not properly have remanded the matter, as it did, with directions to enter judgment for the plaintiffs. The Court was subsequently to say, indeed, that whether the plaintiff has made out a case or controversy "is the threshold question in every federal case. . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Holmes and Brandeis may have been influenced by concepts of privity that have lately passed out of fashion, but this cannot be said of the court that recently decided *Bacchus Imports v. Dias*, 468 U.S. 263 (1984). The plaintiffs in *Dias* were wholesalers who sought to challenge the constitutionality of an excise tax imposed by the State of Hawaii on wholesale sales of liquor. The plaintiff wholesalers added the full amount of the tax to the full amount of the wholesale prices; the plaintiffs' customers, who were licensed retailers, were charged the wholesale price tax. The state argued that the wholesalers had no standing to challenge the tax because they

had not shown that the tax inflicted any "economic injury" on the wholesalers. The Supreme Court rejected this argument out of hand, declaring that the plaintiff wholesalers "plainly" had standing to challenge the tax. *Id.* at 267. (The basis of the challenge was that certain locally produced liquors had been exempted from the tax, with the result that the tax arguably discriminated against interstate commerce.)

The *Dias* court gave two reasons for concluding that the plaintiff wholesalers had shown an injury sufficient to give them standing to contest the constitutionality of Hawaii's tax. In the first place, the Court pointed out,

> "[t]he wholesalers are . . . liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." *Id.*

"Furthermore," the Court said,

> "even if the tax is completely and successfully passed on, it increases the price of [the wholesalers'] products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Id.*

Both of these observations seem pertinent to the situation presented in the case at bar. The plaintiff counties were liable for Detroit's allegedly inflated sewerage charges, just as the plaintiff wholesalers in *Dias* were liable for Hawaii's allegedly unconstitutional tax, whether or not the plaintiffs' customers paid their bills. Even if the plaintiff counties were successful in passing on all of the costs allocated to them, moreover, we see no constitutional impediment to their litigating the issue (assuming it is even relevant) of whether excess costs attributable to the defendants' misconduct had an adverse impact on the counties' "business."

The counties may not have been in competition with others for the sale of sewer services, but surely these counties were in competition with other counties in attempting to attract and retain people and/or industry and commerce. We are not prepared to assume that the availability of cost-effective sewer services cannot affect decisions on where houses will be built, where commercial and industrial enterprises will be located, and where taxpayers will choose to live. The district court believed that "supply and demand do not interact" in this situation because the counties are the only source of sewer services within their respective jurisdictions, 628 F.Supp. 613, but this overlooks the fact that no one is required to live or set up shop in Oakland or Macomb County; there are plenty of other counties in the United States. See *Carter v. Berger*, 777 F.2d 1173, 1177 (7th Cir. 1985). It would clearly be wrong for us to conclude at the outset of this litigation, based merely on the pleadings and Oakland County's affidavit, that the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit. Much of the relevant caselaw, indeed, seems to treat the imposition of an unlawfully inflated price on a direct purchaser as an injury *per se*. Nothing in the Constitution requires us to hold that the counties lack standing to sue:

B

In terms variously described as "broad" (*Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983)), "expansive"(*Blue Shield of Virginia v. McCready*, 457 U.S. 465,472 (1982)), and "sweeping" (*Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1081 (6th Cir. 1983)), section 4 of the Clayton Act, as codified at 15 U.S.C. § 15, provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

A cognate provision in RICO, codified at 18 U.S.C. § 1964(c), provides that:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains, and the cost of the suit, including a reasonable attorney's fee."

Are the plaintiff counties proper parties to bring private antitrust and RICO actions under these statutory provisions? We believe they are.

It is not to be gainsaid that the counties are "persons" within the meaning of the antiturst laws. *Chattanooga Foundry v. Atlanta, supra,* 203 U.S. at 396. If they have not been injured in their "business" of furnishing sewer service, moreover, the counties at least sustained an injury in their property when they paid the allegedly excessive charges. *Id.* That injury, as we have seen, was not eradicated or constitutional standing purposes if the excessive charges were subsequently passed on to the counties' municipal customers—and such a passing on of illegal charges does not normally wipe out the injury for antitrust standing purposes either.

In the leading case of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), where the Supreme Court emphatically rejected an antitrust defendant's argument that the plaintiff could have suffered no legally cognizable injury from illegal overcharges that were reflected, in turn, in the prices charged by the plaintiff to its own customers, the Court held that "when a buyer shows that the price paid by him [in a chain of distribution situation] is illegally high

and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." *Id.* at 489. Justice White's majority opinion in *Hanover Shoe* cited *Chattanooga Foundry v. Atlanta Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, and *Adams v. Mills* with obvious approval, 392 U.S. at 489-90, and while the opinion noted that some lower courts had sustained the "so-called" passing on defense, it pointed out that "[o]thers, beginning with Judge Goodrich's 1960 decision in the case before us, deemed it *irrelevant* that the plaintiff may have passed on the burden of the overcharge." *Id.* at 490 n. 8 (emphasis supplied).

Judge Goodrich (a highly respected circuit judge who sat as a district court judge in the *Hanover Shoe* litigation) concluded that the "excessive price is the injury." 185 F.Supp. 826, 829 (M.D. Pa. 1960). Justice White explained that it was unnecessary, in Judge Goodrich's view, to determine whether plaintiff Hanover had passed on the illegal burden to the next group in the chain of distribution, "because Hanover's injury was complete when it paid the excessive rentals and because ' "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step" ' and to exonerate a defendant by reason of remote consequences. *Id.* at 830 (quoting from *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533, 62 L.Ed. 451, 454, 38 S.Ct. 186(1918))." 392 U.S. at 488 n. 6, quoting 185 F.Supp. at 830.

The Supreme Court stressed two reasons, in *Hanover Shoe*, for its decision to reject Hanover's assertion of a "passing on" defense. First, proper application of such a defense would entail proof of "virtually unascertainable figures," showing precisely what prices would have prevailed had the over-charges not occurred, what effect price changes would have had on sales, and so on. 392 U.S. at 493. Second,

> "[I]f buyers [were] subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."

392 U.S. at 494. (Emphasis in original.)

In the subsequent case of *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), the Supreme Court, again speaking through Justice White, rejected an attempt by indirect purchasers to make offensive use of the "passing on" concept. In holding that the indirect purchasers could not sue to recover the overcharges passed on to them by a middleman, the Court reinforced the construction that *Hanover Shoe* had given § 4 of the Clayton Act. Under that construction, as the Court explained, "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the section. . . ." *Id.* at 729. In the case at bar, of course, this construction of § 4 points to the conclusion that the overcharged county, and not any municipality or ultimate consumer, is the party injured in its business or property within the meaning of § 4.

It was the "evidentiary complexities and uncertainties" involved in applying the pass-on concept that seems to have been most influential in bringing the Supreme Court to "the judgment that the antitrust laws will be more effectively

enforced by concentrating the full recovery for the overcharges in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick*, 431 U.S. at 732, 735. Acceptance of the pass-on approach, the Court warned, "would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.* at 740. Efforts to apportion the recovery among everyone who could have absorbed part of the overcharge "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.* at 737.

The *Illinois Brick* court did concede that the difficulties and uncertainties it foresaw would "be less substantial in some contexts than in others." 431 U.S. at 743. In this connection the plaintiffs had argued—with some lower court support—"that pass-on therories should be permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids." 431 U.S. at 743. Just such a factual situation had been presented in *Obron v. Union Camp Corp.*, 477 F.2d 542 (6th Cir. 1973), *aff'g* 355 F.Supp. 902 (E.D. Mich. 1972)—and this court, in a brief *per curiam* decision, had accepted the pass-on defense in that case. (The plaintiff in *Obron* was a middleman who purchased mesh bags from defendant Union Camp at a fixed percentage off Union Camp's suggested list price; the middleman then resold at list to customers who took delivery of the bags, without alteration, in "drop shipments" from Union Camp.)

In a passage that implicitly repudiated our *Obron* decision, the *Illinois Brick* court rejected the argument that pass-on theories should be permitted for middlemen reselling goods without alteration and for contractors adding a fixed percentage markup:

> "We reject these attempts to carve out exceptions to the Hanover Shoe rule for particular types of markets.
>
> * * *
>
> An exception for the contractors here on the ground that they purport to charge a fixed percentage above their costs would substantially erode the Hanover Shoe rule without justification."

431 U.S. at 744 (footnote omitted).

Although *Obron* itself would doubtless have been decided differently had it reached us after the Supreme Court's decision in *Illinois Brick*, both *Illinois Brick* and *Hanover Shoe* recognized the possibility that there "might" be situations of a different sort where the considerations requiring rejection of the pass-on defense would not be present. Thus a pass-on defense "might" be permitted, the Supreme Court said, "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged. . . ." 392 U.S. at 494; 431 U.S. at 724 n. 2.

In the case at bar the district court thought that if the counties could be said to be buyers at all, their arrangements with the municipalities constituted, "in essence," pre-existing cost-plus contracts. 628 F.Supp. at 613. Relying in part on our observation in *County of Oakland v. City of Berkley*, 742 F.2d 289, 296 (6th Cir. 1984), that Oakland County was "a mere conduit" through which payment of charges allocated to the municipalities flowed into the coffers of the City of Detroit, the district court decided that it was "easy to prove" that the plaintiff counties had not been damaged. Accordingly, the court concluded, even if the counties could meet the standing requirement, the cost-plus contract exception to the *Hanover Shoe* rule ought to be invoked. 620 F.Supp. at 1402-03.

Mindful, as we were in *Jewish Hospital Assn. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), "of the *Illinois Brick* Court's emphasis upon the narrow scope of exemptions to the indirect-purchaser rule," we are not persuaded that a cost-plus contract exception, assuming it exists, precludes the direct purchaser from maintaining suit in the case at bar. To allow the passing on defense in this particular case, we believe, would invite precisely the sort of compexities, uncertainties, and other untoward consequences that the indirect purchaser rule was designed to avoid.

We are not dealing here with a situation in which an antitrust violator has sold a single item to a single middleman who has resold the item under a pre-existing cost-based contract to a single consumer. In a situation of that sort it might well be easy to prove that the burden of the overcharge had been borne solely by the consumer—and in the absence of other consumers, there could not be any problem in determining how to allocate the overcharge at the consumer level.

In the present situation, by contrast, our hypothesis must be that Detroit sold sewerage services, at inflated prices, to counties that resold the services to scores of municipalities; that the counties attempted to pass their costs on to the municipalities under a confusing array of formulae based partly in actual meter readings and partly on estimates; and that the municipalities attempted, in turn, to pass their costs on to thousands of consumers under similar formulae. If both the counties and the municipalities were 100 percent successful in passing all of the overcharges on to the consumers, the logic of the pass-on theory is that the appropriate plaintiffs in this case are not a few dozen municipalities, but thousands of individual householders, businesses, and other consumers. See *Hanover Shoe*, 392 U.S. at 494. "The fact is," as the district court observed in the present case, "that

the end users, because they have no one to whom they can pass on their costs, are the ultimately injured party." 628 F.Supp. at 612.

For the antitrust violators to be held answerable in damages at all, under the pass-on approach, this case would thus have to be transformed into a massive class action on behalf of a huge group of remote consumers, with or without the municipalities and the counties as additional plaintiffs. The task of determining the actual amount of each individual class member's actual damage would present enormous "evidentiary complexities and uncertainties," to borrow a phrase from *Illinois Brick*, if it would not entail proof of what *Hanover Shoe* called "virtually unascertainable figures."

The risk in adopting the pass-on approach, it seems to us, is not so much that consumers having only a tiny stake in the lawsuit would have "little interest in attempting a class action," *Hanover Shoe*, 392 U.S. at 494, but that self-appointed representatives of the class would have all too much interest in attempting such an action. The net result of our approving the pass-on approach, assuming the class representatives and their counsel would resist the temptation to settle the case for too little, could well be protracted and hard-to-manage class litigation generating large attorney fees, but not necessarily doing much good for any particular individual who did not happen to be a lawyer for the plaintiff class. See *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985). "The class action and the entrepreneurial lawyer may be the best possible solution to some legal problems," *id.*, but we think the solution of choice for the problem at hand is the solution endorsed by Holmes and Brandeis and White. J.J.: "concentrating the full recovery for the overcharge in the direct purchasers rather than ... allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick*, 431 U.S. at 735.

We are strongly confirmed in this judgment by the Supreme Court's post-*Illinois Brick* decision in *Associated General Contractors v. California State Council of Carpenters.* 459 U.S. 519 (1983). That decision, as we indicated in *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085-86 (6th Cir. 1983), directs us "to consider the §4 inquiry on a case by case basis," applying the factors that historically have "circumscribe[d] and guide[d] the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." 459 U.S. at 537. The "factors" mentioned in Justice Stevens' majority opinion in *Associated General Contractors* weigh heavily in favor of concentrating the full amount of any recovery in the counties—where the recovery would, presumably, redound to the benefit of the counties' residents, most of whom presumably would have been ultimate consumers of the allegedly overpriced sewerage services.[6]

The first of the factors that favored judicial recognition of the plaintiff's antitrust claim in *Associated General Contractors* obviously favors recognition of the counties' claims here; in this case, as in *Contractors*, "[t]he complaint does allege a causal connection between an antitrust violation and harm to the [plaintiff] and further alleges that the defendants intended to cause that harm." 459 U.S. at 537.

Although an allegation of improper motive "is not a panacea that will enable any complaint to withstand a motion to dismiss," this factor "may support a plaintiff's damages claim under § 4. . . ." 459 U.S. at 537 (footnote omitted). It is hard to imagine how improper motives could be alleged any more clearly than they have been in this case.

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[6] The district court saw no reason why the end users would benefit if the counties' enterprise funds were replenished through a recovery in this litigation. 628 F.Supp. at 613. As we understand it, however, the funds are strictly non-profit, so any recovery would ultimately have to be passed through to the end users via charges lower than those that would otherwise be imposed.

The next factor on which Justice Stevens found it appropriate to focus in *Contractors* is "the nature of the plaintiff's alleged injury." 459 U.S. at 538. The injury claimed by the plaintiff counties in the instant case in a classic example of precisely the sort of injury with which the antitrust laws were intended to deal; the prices the counties had to pay, according to the complaints, were higher than they would have been had the defendants not broken the law. The fact that the counties' injury, like the injury alleged by the plaintiff in *Blue Shield v. McCready*, 457 U.S. 465, 483 (1982), "was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws" is a factor that may in itself be "controlling." *Contractors*, 459 U.S. at 538, *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977).

"An additional factor," *Contractors* says, "is the directness or indirectness of the asserted injury." 459 U.S. at 540. As direct purchasers, the counties obviously assert a direct injury.

The state of the law at the time the antitrust statutes were initially adopted makes the direct injury a particularly significant factor. The substance of § 4 of the Clayton Act, as Justice Stevens pointed out in *Contractors*, 459 U.S. at 530, was originally enacted in 1890 as § 7 of the Sherman Act, and "[t]he repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background." *Id.* at 531 (footnote omitted). The doctrine of privity of contract—specifically mentioned in *Contractors* at 459 U.S. 533—was in its heyday in 1890, and *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (quoted in *Contractors* at 459 U.S. 534) stated a truth with which lawyers practicing in 1890 would have been totally comfortable when it said that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." The

generation of which Senator Sherman and Mr. Justice Holmes were both members would have been unsympathetic to the view that the City of Detroit could be sued for damages, in a situation such as that presented here, by any entity with which the city did not have a direct contractual relationship.

The damages claim of the plaintiff in *Contractors* was found to be "highly speculative," a factor that cut against recognition of the plaintiff's action. 459 U.S. at 542-43. The claims of the counties in the case at bar, on the other hand, are obviously less speculative than the claims of remote consumers who, unlike the counties, may have had their individual charges computed on the basis of estimates and arbitrary formulae.

The next factor identified in *Contractors*—"the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits," 459 U.S. at 543—is one we have already addressed. A straightforward action by Oakland and Macomb counties alone would obviously be more manageable than a class action brought on behalf of thousands of remote consumers whose individual claims would present extraordinary complexities. If "the risk of duplicate recoveries" is minimal in this case, "the danger of complex apportionment of damages" (459 U.S. at 544) certainly is not. The task of making a proper allocation and distribution of any recovery to thousands of end users would be a formidable one, particularly in view of the frequency with which modern Americans change their places of residence.

Although we have focused primarily on the antitrust laws in the foregoing discussion, most of what we have said is applicable also to the treble damage provision of RICO, 18 U.S.C. § 1964(c), a provision patterned directly on § 4 of the Clayton Act. If the counties are the proper parties to sue for damages allegedly arising out of violations of the antitrust laws, it seems clear that the counties are also the proper parties to sue for damages allegedly arising out of RICO violations. See *Carter v. Berger*, 777 F.2d 1173 (7th Cir.

1985), and *Terre Du Lac Association v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Under both statutes, on the facts that we are required to assume here, the counties are indeed the proper parties to bring suit. The complaints should not have been dismissed.

III

The various discovery issues raised by the parties are entirely unrelated to the standing issue, and both the protective order from which Oakland County appeales and the order denying in part a motion to quash various subpoenas, from which certain defendants cross-appeal, are interlocutory orders that would not ordinarily be immediately appealable. Indeed, we have previously dismissed attempts to take immediate appeals from these very orders. We think it would be premature to undertake appellate review of the discovery orders before the case is even at issue.

The order granting the defendants' motion for summary judgement is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this opinion.

NOS. 86-1200/1217/18/66/67/68/1303/34
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE COUNTY OF OAKLAND,
Plaintiff-Appellant,
Cross Appellee,

and

THE COUNTY OF MACOMB,
Intervening
Plaintiff-Appellant,
Cross Appellee,

v.

THE CITY OF DETROIT, *et al.*,
Defendants-Appellees,

NANCY ALLEVATO, MICHAEL J. FERRANTINO, SR., WAYNE DISPOSAL, INC., CHARLES CARSON, MICHIGAN DISPOSAL, INC., and WALTER TOMLYN,
Defendants-Appellees,
Cross Appellants,

and

COLEMAN YOUNG, *et al.*,
Defendants-Appellees,
Cross Appellants.

ORDER

BEFORE: MERRITT and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

The court having received the defendants' various petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on any of the three suggestions for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

After receipt of the petitions for rehearing, we requested that petitioner City of Detroit furnish a record citation for a purported contract that was quoted and relied on heavily in the city's petition for rehearing. The city conceded that the contract was not part of the record, but the city moved to enlarge the record by adding both the contract quoted in the petition for rehearing and a later contract. The plaintiffs have responded in opposition to the motion.

The city had ample opportunity to present this evidence in a timely manner in the district court. It did not do so. Neither did the city move to correct or modify the record pursuant to Fed. R. App. P. 10(e) at the time this case was originally heard. The attempt to change the record after an adverse decision had been rendered by the court of appeals simply came too late. See generally 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3956 (1977). The City of Detroit's "motion to add documents to record" is **DENIED.**

If we had been prepared to accept the tendered contracts, it would not have led us to grant rehearing in this case. In our original opinion we assumed, for purposes of the opinion, "that any and all overcharges were passed on to the counties' own customers, the municipalities." Slip op. at 11. The contracts simply confirm what we had already assumed.

The contracts in question do not affect the constitutional standing issue. The initial purchaser in a chain of distribution does not lack standing in a constitutional sense if charges are passed down the line. As we noted in our original opinions,

> "[e]ven if the plaintiff counties were successful in passing on all the costs allocated to them, . . . we see no constitutional impediment to their litigating

> the issue (assuming it is even relevant) of whether excess costs attributable to the defendants' misconduct had an adverse impact on the counties' 'business' " Slip op. at 14.

The question of whether a plaintiff has standing to sue under the antitrust laws depends largely on prudential considerations, including the importance of construing the antitrust laws in a way that preserves the effectiveness of the private antitrust action and furthers the orderly administration of justice. If the counties are not appropriate plaintiffs because they passed their costs on to municipalities, surely the municipalities, which in turn passed their costs on to individual residential and commercial customers, are not appropriate plaintiffs either. We continue to believe that "[e]fforts to apportion the recovery among everyone who could have absorbed part of the overcharge 'would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.' " Slip op. at 16 (quoting *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720,737 (1977)).

Furthermore, the *Illinois Brick* Court's observation that a cost-plus contract exception "might be permitted" was limited to contracts for a fixed quantity. 431 U.S. at 736. Although at least one court has been prepared to read the cost-plus exception more broadly in cases involving offensive use of a pass-on theory, see *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir. 1988) (en banc), *cert. denied*, ____ U.S. ____, 102 L.Ed.2d 573 (1988), we do not think the purposes of the antitrust laws would be well served by reading the cost-plus contract exception so broadly in a case involving the defensive use of the pass-on theory.

We have also reviewed the petitions for rehearing filed by the other defendants, and we conclude that all of the questions addressed in those petitions were fully considered upon the original submission and decision of this case. The petitions for rehearing are **DENIED.**

ENTERED BY ORDER OF
THE COURT

LEONARD GREEN

Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

THE COUNTY OF OAKLAND, by George W. Kuhn, the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh, the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

CIVIL ACTION NO. 84-1068

HON. RICHARD F. SUHRHEINRICH

ORDER DENYING PLAINTIFFS' MOTION TO ALTER JUDGMENT

In accordance with the Memorandum Opinion bearing this date,

IT IS HEREBY ORDERED that plaintiffs' motion to alter judgment is DENIED.

DATED: _____

RICHARD F. SUHRHEINRICH

RICHARD F. SUHRHEINRICH
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

THE COUNTY OF OAKLAND, by George W. Kuhn, the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh, the Macomb County Public Works Commissioner,
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THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

CIVIL ACTION NO. 84-1068

HON. RICHARD F. SUHRHEINRICH

MEMORANDUM OPINION

On October 31, 1985, this Court granted summary judgment for defendants in this matter, finding that Oakland and Macomb Counties were not the proper parties to bring suit. The Counties, pursuant to Fed. R. Civ. P. 59(e), have moved

to alter this judgment. The Counties maintain that this Court misunderstood the relationships at issue in this case, and that these relationships confirm their standing to sue. To the contrary, the Counties' briefs, which discuss these relationships, merely serve to confirm that the Court did understand the relationships and that its granting of summary judgment was proper.

Macomb County adopts the brief of Oakland County in this motion. However, it is unclear whether the relationships between the relevant parties are identical in the two Counties. For purposes of this motion, the Court will consider that they are.

The relevant relationships, as described by the Counties, are as follows. The Counties contract with Detroit for sewage disposal. The Countries, by statute, own, operate, and administer the sewer systems that connect the sewer systems to Detroit's interceptors. The Counties determine the cost of maintaining the interceptor system, add that cost to the Detroit charges, and then bill the municipalities. The Counties then collect the aggregate fees charged to the municipalities and then pay Detroit from the specific, segregated sewer Funds maintained by the County for each of the three County sewer Districts. It is these Funds that the County seeks to protect by this suit. Similarly, the fees charged the municipalities by the County are paid by the municipalities from their own segregated sewer funds supported exclusively by user fees.

The conclusion that plaintiffs wish to draw from these facts is that the Funds are directly and adversely impacted by the illegal overcharges described in their complaint. These funds, plaintiffs argue, are the ultimately injured entities. The Court disagrees. The Court appreciates and understands the statutorily mandated, active role which the Counties play in the administration of the metropolitan sewer system. However, this alone is not evidence of injury.

The Counties have misconstrued the cause and effect of any dissipation of the Funds which they maintain. The plantiffs determine the cost of maintaining their interceptor systems, add this to the charges of the City of Detroit, and send an aggregate bill to the municipalties. Any dissipation of the Funds is caused by the failure of the municipalities to pay their contractual obligation to the Counties. The Funds are not injured by the upstream actions of defendants herein; rather, they are injured by the downstream actions of the municipalities and end users. Perhaps a more proper cause of action, if the goal is to replete the Funds, would be a contractual one against the municipalities.

Another concern of this Court, as discussed in its first memorandum opinion, is that of duplicative recovery. The municipalities operate in the same manner as the Counties, i.e., they maintain segregated funds. If the situation were as plantiffs posit, the municipalities' funds would similarly be dissipated. Thus, under plaintiffs' scheme, the municipalities could maintain a concurrent cause of action. Further, the end users' "funds" would likewise be dissipated. They, too, could presumably maintain an action. Thus, there is great potential for duplicative recovery.

The fact is that the end users', because they have no one to whom they can pass on their costs, are the ultimately injured party. The plantiffs and municipalities are really no more than conduits between Detroit and the end users. It is the end users who must pay any alleged overcharges.

The plaintiffs argue that permitting them, rather than the municipalities or the end users, to bring suit will avoid the problems identified in *Hanover Shoe* and *Illinois Brick*. First, the Counties contend that it is easier for them to trace the alleged overcharges. However, the simple ability to trace the overcharges does not establish the crucial element—injury. Further, the records are just as available to the municipalities and, perhaps, to the end users, which would permit them to

trace their overcharges. Second, plaintiffs contend that the individual end users do not have the same incentive, expertise, and resources to bring this action. However, the Supreme Court has, in a similar case, held just the opposite. In *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972), the Court stated:

> Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture .... The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.

This type of action, then, would install the actually injured parties as plaintiffs, would avoid duplicative recovery, eliminate tracing problems, and provide sufficient resources to maintain suit.

The Counties then argue that, in a sense, they are suing on behalf of the end users, who will benefit by plaintiffs' recovery. The Court has four responses. First, this argument is inconsistent with plaintiffs' contention that it is not a mere conduit for the municipalities and end users. Second, plaintiffs have maintained throughout the proceedings that they are not suing on behalf of the end users (*see* Memorandum on Behalf of Oakland County in Opposition to the Motions to Dismiss Antitrust Counts, p. 6, fn. 1). Third, Congress has established that only a state, acting through its attorney general, may sue as *parens patriae* of its citizens. 15 U.S.C. § 15c(A)(1) (Supp. 1983). Fourth, and most importantly, plaintiffs show no

reason, and the Court sees no reason, why the end users would benefit by recovery by the Funds.

Oakland County then tries to argue that it itself is an end user of the sewage services and has standing to sue in that capacity. Paragraph 18 of the affidavit of Robert H. Fredericks II establishes that "Wastes from County buildings are discharged into municipal systems which are part of the three Districts. Oakland County pays the respective municipalities for their services just as any other user". The Court agrees that Oakland County would have standing to sue in this capacity. However, there are two problems. First, a fair reading of the Complaint shows that the Counties were not suing in this capacity, but were suing as administrators of the sewage system Funds. Second, if such an action were to be brought, the Counties would be limited to treble damages only for the alleged overcharges attributable to them as end users.

The Counties, in their motions to alter judgment, renew their argument that their "injuries" are redressable under *Hanover Shoe* and *Illinois Brick*. The Court adequately addressed this argument in its first opinion. To the extent new arguments are raised by plaintiffs, however, it will do so again.

Plaintiffs initially argued that the "pass-on" defense was inapplicable here. Now plaintiffs contend that there is no "pass-on" because, in effect, there is no resale. This is because the Counties, the municipalities, and the end users are really one party contracting with the City of Detroit. The absurdity of this argument is shown by *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984), where the County sued Berkley to recover unpaid sewage funds. If, indeed, the parties are really one and there is no resale, why would Oakland bring suit to recover Berkley's contractual obligations? Further, *Berkley* established that if a municipality does not pay its share, either the other municipalities or the

City of Detroit, and not the Counties, pick up the slack. Thus, the plaintiffs' argument that they are one with the municipalities and end users fails. Also, it is inconsistent with the Counties' argument that they are not mere conduits.

Plaintiffs further argue that this case is identical to *Illinois Brick* and *Hanover Shoe* and that the "pass-on" defense should not apply for this reason. However, as this Court has previously pointed out, this case differs in two important respects. First, the fundamental reason for not allowing the "pass-on" defense is that the direct purchaser is injured even where he can "pass-on" overcharges to an indirect purchaser. This is because he is "passing on" the overcharges at inflated prices, which, when supply and demand interact, reduces the demand for his product. Here, because plaintiffs are monopolies, supply and demand do not interact. Thus, they are uninjured by the alleged overcharges.

Second, the "cost plus" exception, as discussed in *Obron v. Union Camp Corporation*, 355 F.Supp. 902, 907 (E.D. Mich. 1972), *aff'd*, 417 F.2d 542 (6th Cir. 1973), is applicable here where it was not in *Hanover Shoe* and *Illinois Brick*. Here, the Counties take the cost of the Detroit charges, add that to the cost of maintaining their systems, and bill the municipalities. In essence, this is a pre-existing "cost plus cost" contract. The Counties have no incentive to absorb any overcharges. Thus, the Counties suffer no injury and lack standing. This is exactly the situation where the exception to *Hanover Shoe* and *Illinois Brick* for cost plus contracts should apply. In essence, plaintiffs are not initially injured and, thus, have no injury to "pass on". They simply serve as an intermediary between the municipalities and Detroit. Plaintiffs are not initially injured by any overcharges because it is not their obligation to pay them. They simply act as bill collectors for the City of Detroit. Thus, either the municipalities or end users who must pay the bills or Detroit itself (which absorbs the charges when unpaid) are injured.

The cases cited by plaintiffs in support of their argument that the "pass-on" defense should not apply are easily distinguishable. In *City of Cleveland v. Cleveland Elec. Illum. Co.*, 538 F.Supp. 1320 (N.D. Ohio 1980), plaintiff, a City municipal utility that purchased electricity from defendant and sold it to citizens, was held to have standing to sue. The critical difference between that case and this case is that there, as that Court noted, the plantiff City of Cleveland had an incentive to absorb part of the overcharge: its need to attract customers. *Id.* at 1324-25. Here, however, there is no such incentive because plaintiffs have monopolies. Thus, if they pass on inflated prices, they need not worry about losing business to other customers. Similarly, *Jewish Hospital Ass'n v. Stewart Mechan. Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), was a case where, unlike here, the plaintiff had an incentive to absorb the overcharge. *Id.* at 975-77. In sum, the Court agrees that *Hanover Shoe* and *Illinois Brick* favor antitrust suits by the direct purchasers. However, this is a situation where such a presumption does not apply.

Plaintiffs' argument that *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), authorizes a suit such as this (at p. 4 of Oakland's Reply Memorandum in Support of Motion to Alter Judgment) seriously misconstrues that case. *Hawaii* simply holds that § 4 of the Clayton Act authorizes a state to sue either in its proprietary capacity as a consumer in the marketplace or for injury to its general economy, but not both. *Id.* at 262-3.

As discussed earlier in this opinion, plaintiffs are not suing in their proprietary capacity as consumers in the marketplace. If they were, their damages would be limited to the overcharge attributable to them as end users. Rather, plaintiffs are suing as administrators of the sewage system.

Further, plaintiffs are not suing for injury to their general economy. Plaintiffs have always maintained that they are not

suing on behalf of their citizens and such *parens patriae* suits are limited to the states.

The Court must also clear up another misconception. Plaintiffs seem to be of the opinion that this Court found the municipalities were the proper party to bring suit. The issue of the municipalities' standing is not now, and has never been, before this Court. The Court has discussed the potential standing of other entities to show potential for duplicative recovery and to help show why the Counties do not have standing. It would be improper for the Court to rule on the standing of any party not before it. The Court also notes that Macomb County's request for the substitution of the municipalities for the counties pursuant to Fed. R. Civ. P. 17(a) is an improper use of that rule.

The Court also wishes to reiterate its discussion of *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983) where the court found the following factors relevant to determining antitrust standing:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
>
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
>
> (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;
>
> (4) the potential for duplicative recovery or complex apportionment of damages; and
>
> (5) the existence of more direct victims of the alleged antitrust violation.

Relating these factors to the case at bar, it is clear that plaintiffs do not have standing:

> (1) The cause of any harm to the plaintiff is the failure of the municipalities to replenish the funds. There is no allegation that any harm was intentional;
>
> (2) Plaintiffs are not competitors in the relevant market. They are consumers only to the very limited extent of the fees they pay for end use;
>
> (3) Any injury plaintiffs may suffer is indirect through the inability of the municipalities to pay their bills;
>
> (4) There is great potential for duplicative recovery; and
>
> (5) The municipalities and end users are more direct victims of any antitrust violations.

The Court wants to emphasize that it makes no finding whatsoever as to the existence of an antitrust violation. Further, the Court does not deny that the Counties play a very significant role in the administration of the metropolitan sewage system. However, plaintiffs have been unable to allege the existence of an antitrust injury. In a matter that involves the potential recovery of a substantial amount of damages, the Court feels that the party bringing suit, and potentially recovering, must be one injured by the alleged violations.

RICO Claims

Plaintiffs also move to alter this Court's dismissal of their claims under RICO. The Court granted dismissal because plaintiffs did not allege the prerequisite of injury to have standing. RICO, and the issue of standing, have recently been addressed by the Supreme Court. In *Sedima, S.P.R.L. v. Imex Co.*, 105 S.Ct. 3275, 3286 (1985), the Court held:

> . . . plaintiff only has standing if, and can recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

There exists the requirement under RICO, as under the antitrust acts, that the plaintiff must suffer an injury by defendants' actions before it has standing to sue. Here, as discussed above and in the Court's original Memorandum Opinion, plaintiff simply has not been injured by defendants' conduct. Any injury the Counties suffer is a result of the municipalities not fulfilling their contractual obligations. Further, the relationships between the parties, as described in *Berkley* and by plaintiffs, establishes that any failure to pay by a municipality will result in the other municipalities or the City of Detroit picking up the slack. Thus, the Court does not find any possibility of injury to the Counties by defendants' conduct.

Terre Du Lac Assoc., Inc. v. Terre Du Lac, No. 84-2296 (8th Cir. Sept. 9, 1985) does not change this result. In *Terre Du Lac,* plaintiff was a property owners' association complaining about the costs of failing to maintain roads in a subdivision. The Court held that, in that case, plaintiff did not lack standing merely because it may pass its injuries on to its members. Certainly, the Court did not abandon the constitutional requirement of an injury in fact.

Further, *Terre Du Lac* is distinguishable. In that case, the Association suffered an injury and then passed the injury along to its members. Here, the Counties do not suffer an injury which can be passed along to the municipalities. Rather, the Counties serve as mere bill collectors for the City of Detroit. If they are unable to collect, the Counties do not suffer. Rather, any injuries resulting from defendants' conduct, either directly or indirectly, is borne by the municipalities and/or end users. Thus, the Counties suffer no injury which can be passed along.

An appropriate order, in accordance with this Memorandum Opinion, will be entered.

DATED: February 5, 1986

RICHARD F. SUHRHEINRICH

RICHARD F. SUHRHEINRICH
United States District Judge

L. BROOKS

Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COUNTY OF OAKLAND, by George W. Kuhn, the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh, the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

CIVIL ACTION NO. 84-CV-1068-DT

JUDGMENT

The above-entitled matter having come before the Court, Honorable Richard F. Suhrheinrich, United States District Judge, presiding, on defendants' motions to dismiss all counts of the complaint; and in accordance with the Memorandum

Opinion and Order Granting Defendants' Motions to Dismiss all Counts of the Complaint,

IT IS ORDERED AND ADJUDGED that defendants' motions to dismiss all counts of the complaint be, and hereby are, GRANTED. The complaint is dismissed with prejudice.

Dated at Detroit, Michigan, this 31st day of October, 1985.

ROBERT A. MOSSING
CLERK OF THE COURT

by LILLIAN BROOKS
Deputy Clerk

Approved:

RICHARD F. SUHRHEINRICH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COUNTY OF OAKLAND, by George W. Kuhn, the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh, the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

CIVIL ACTION NO. 84-1068

HON. RICHARD F. SUHRHEINRICH

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS ALL COUNTS OF THE COMPLAINT

For the reasons set forth in the Memorandum Opinion bearing this date,

IT IS HEREBY ORDERED that Defendants' Motions to dismiss all Counts of the Complaint are GRANTED.

DATED: October 31, 1985

RICHARD F. SUHRHEINRICH

RICHARD F. SUHRHEINRICH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COUNTY OF OAKLAND, by George W. Kuhn, the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh, the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

CIVIL ACTION NO. 84-1068

HON. RICHARD F. SUHRHEINRICH

MEMORANDUM OPINION

Facts[1]

Oakland County enters into contracts with the City of Detroit and the Detroit Water and Sewerage Department (DWSD) for the transportation, treatment, and disposal of sewage. The work is performed by the Detroit Waste Water Treatment Plant (DWWTP). Detroit charges Oakland County according to the costs incurred by Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from its municipalities and pays Detroit.

The United States, in 1977, brought a civil action against Detroit and DWSD for violation of federal laws regulating discharge of pollutants. The parties entered into a consent judgment in which the defendants agreed to comply with the federal regulations by upgrading DWWTP. Mayor Young was appointed administrator of the DWWTP to speed up compliance.

Prior to 1979, sludge removed from sewage had been incinerated or discharged into the Detroit River. After 1979, because of the consent judgment, increasing amounts of sludge were required to be disposed of. As a result, Detroit entered into a contract with Michigan Disposal, owned by defendant Ferrantino, for hauling and disposal by landfill. As increasing amounts of sludge were needed to be disposed of, DWSD realized another contract would be necessary.

Michigan Disposal submitted an unsolicited proposal to increase its volume of disposal. DWSD rejected the proposal. Thereafter, Ferrantino and Michigan Disposal decided to establish a front company that would hide the interest of Ferrantino and Michigan Disposal to secure the second sludge disposal contract. Bowers, confidant of Young and Beckham,

[1] This section discusses the factsas *alleged* in the complaint. These are by no means findings of fact.

agreed to advance the scheme that was set forth. Ferrantino, Bowers, Tomyn, Cusenza, Valentini and Owens agreed to form the front company to be known as Vista Disposal Inc., which Owens would falsely hold himself out as owning.

On May 9, 1980, Vista submitted to Beckham its hauling and disposal proposal. Bowers, using her influence as friend of Young and Beckham, tried to speed the consideration and grant the proposal. Young and Beckham agreed to grant the proposal. At the time they did so, they knew or should have known that Vista was a mere front company.

Beckham announced to David Fisher, an employee of DWSD, that he wanted the Vista proposal implemented. Fisher advised Beckham that Detroit was obligated to permit public bids on such contracts, and to award the contract to the lowest qualified bidder. Beckham rejected this procedure and instead merely requested Requests for Qualifications. DWSD, through Beckham, then notified Vista that it had been selected.

Carson, Vista's attorney, negotiated the terms of the contract with the City. By-passing the City Council, Young, purportedly acting under his authority as Administrator of DWWTP, approved the contract. Thereafter, Bowers paid money to Beckham for his aid and influence. Vista then entered into a joint venture with Wolverine-Detroit to perform the contract.

Based upon the above allegations, plaintiffs brought three charges. Counts I and II charge violations of the Sherman Act. Counts III-VII charge violations of RICO. Last, Count VIII charges Coleman Young with Breach of Fiduciary Duty.

Motions to dismiss have been filed as to each Count. For the reasons stated below, the motions are granted.

Antitrust Counts

Defendants have brought motions to dismiss plaintiffs' antitrust counts for several reasons. The threshold issue which must be addressed is that of standing. The action alleges in Counts I and II that defendants violated the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1973), by fixing the price for disposal sludge, excluding competition for disposal sludge, and monopolizing the hauling and disposal of sludge. The Counties have not sued as *parens patriae* on behalf of their citizens because Congress has specifically delegated this power to the various State Attorney Generals. Rather, the Counties maintain that they, themselves, were injured by defendants' actions as direct purchasers.

Plaintiffs allege that they were injured in that the charges collected by Detroit for the treatment and disposal of their sewage have been unlawfully inflated as a result of defendants' antitrust violations. Defendants maintain that plaintiffs have suffered no injury because any inflated sums are collected from the individual municipalities, i.e., they are "passed on" to the customer. This "passing on" defense arises where a middleman sues the seller of a good or service for an antitrust violation. The defense provides that the middleman is not injured because it passes on any inflated prices to the consumer and the middleman has no standing as it has no loss. It is axiomatic that the Constitution requires that plaintiffs must allege an "injury in fact" to have standing to sue. *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973). Further, standing requirements must be affirmatively pled in the complaint. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

The leading case on the "passing on" defense is *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L.Ed.2d 1231 (1968). In *Hanover*, the court found that United Shoe had violated section 2 of the Sherman Act by virtue of its leasing of and refusing to sell certain shoe machinery which, in turn, caused inflated prices to Hanover

Shoe. United Shoe attempted to assert the "passing on" defense against Hanover Shoe, alleging that Hanover merely passed on any inflated prices to its customers.

The court rejected the "passing on" defense in that case, noting that so long as Hanover Shoe paid more than it should, its profits were lower than they would have been without the illegal activity. Although the court in *Hanover* severely restricted the "passing on" defense, it did not abandon it. The court said:

> We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing on defense not be permitted in this case would not be present. *Id.* at 494

Thus, the "passing on" defense, though limited, is still viable in certain situations.

The Sixth Circuit analyzed the "passing on" defense in *Obron v. Union Camp Corporation,* 477 F.2d 542 (6th Cir. 1973). The court of appeals adopted Honorable Philip Pratt's memorandum opinion at 355 F. Supp. 902 (E.D. Mich. 1972). In *Obron,* the defendant, Union Camp, manufactured mesh bags used by produce packagers. Obron, a distributor of these bags, would obtain an order from a customer and then submit it to Union Camp. The bags were sent directly from Union Camp to the customer. Union Camp would then bill Obron at 5% under list price and Obron would bill the customer at the list price. Obron sued Union Camp for Sherman Act violations arising out of the enforcement of an invalid patent.

In allowing the use of Union Camp's "pass on" defense, the district court said, "the crucial issue here is whether the circumstances of the case create a situation where it would

be easy to prove that an overcharged buyer has not been damaged". 355 F.Supp. at 906. The court held that the contract was so strikingly similar to a pre-existing cost plus contract that the defense would be allowed. Obron, rather than being injured by defendant's actions, actually profited from them because it recovered, in effect, a sales commission percentage of the cost. Obron had no control over what price was charged customers. Thus, the reasoning of *Hanover*, that plaintiffs could have charged the inflated price without the higher cost and, thus, increased their profits, was inapplicable.

The issue in this case is whether the circumstances are such that proof that any overcharged buyers (i.e., the Counties) have not been damaged is easy to prove. To determine this, an analysis of the contractual relationships involved is necessary. As discussed in paragraph 20 of Plaintiff Oakland County's Complaint:

> Detroit charges Oakland County according to the cost incurred by Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from municipalities within each district and pays Detroit.

The same type of relationship is discussed in paragraph 20 of Macomb County's Complaint.

This relationship was described by the Sixth Circuit in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984). In that case, Oakland County, which was responsible for collecting charges from the municipalities that used the City of Detroit's sewage disposal system, brought suit against Berkley for declaration of amounts owed by it. In discussing the contract between the County of Oakland and the City of Detroit in which the City of Detroit agreed to receive and dispose of sanitary and storm sewage from the municipalities involved, the court held: "Oakland County served as an intermediary only, depending completely on payments from

the municipalities to meet its obligation to Detroit". *Id.* at 292. Further, the court held that: "Since Oakland County is a *mere conduit* for sewer charges owed to the City of Detroit the failure of any of the municipalities. . .to pay the charges allocated to them would *result in Detroit's receiving less money* for sewage disposal than was assumed and planned for. . . ." *Id.* at 296 (emphasis added).

In applying the relationship of the parties to the law concerning the "passing on" defense, it becomes clear that the plaintiffs have not alleged the requisite damages to maintain standing in this matter. The Counties sustain no injury because they are only an intermediary. Thus, they derive no profit level which could be injured by the defendants' actions. In effect, the Counties are not really passing on inflated prices to the municipalities because they are not buyers of the service. Rather, the allegedly inflated prices are aimed directly at the municipalities and the Counties merely collect the sums necessary to pay those charges. The Counties are, in a sense, mere collection agencies. The Court, therefore, holds that the Counties do not allege facts sufficient to meet the Constitutional standing requirement of an "injury in fact". There is nothing in the complaints indicating that they suffer an injury.

Further, from a theoretical standpoint, this is a perfect example of when the exception to the *Hanover Shoe* rule should be invoked.[2] The Court's reasons in *Hanover Shoe* for allowing a middleman to recover without deduction for "passing on" were the difficulties of the calculation of the overcharge to all the affected customers and the discouragement to the ultimate consumer's suit where he is too little affected to sue. Neither of these problems is present here. Since the municipalities are charged directly for the services

[2] See E. Schafer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 Wm. & Mary L. Rev. 883 (1975); R. Harris & L. Sullivan, *Passing on the Monopoly Overcharge: a Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269 (1979).

rendered, it is no more difficult to trace any overcharges if the consumers (the municipalities) sue than if the Counties sue. Further, if the allegations are true, the municipalities have been significantly affected; thus, there is sufficient incentive for them to sue.

Aside from this inquiry into whether or not there is Constitutional standing, there is a separate inquiry whether the plaintiffs have standing under section 4 of the Clayton Act. As The Supreme Court noted in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897 (1983);

> Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a *further* determination whether the plaintiff is a proper party to bring a private antitrust action.

Id. at 907 (emphasis added). So even assuming that plaintiffs had alleged sufficient "injury in fact" for constitutional purposes, and this Court holds that they have not, they would have only cleared the first hurdle. They would also need to show standing as a matter of antitrust law. As interpreted by the Sixth Circuit in *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1979 (6th Cir. 1983), the factors to be considered in determining antitrust standing are:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
>
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
>
> (3) the directness or indirectness of the injury, and the related injury of whether the damages are speculative;

(4) the potential for duplicative recovery or complex apportionment of damages; and

(5) the existence of more direct victims of the alleged antitrust violation.

Id. at 1085. In *Southaven*, it was alleged that defendant Malone intentionally monopolized the food market industry in its local geographic area. When defendant became aware that plaintiff had a tenant prepared to immediately compete in the relevant grocery market, it refused to surrender the premises to Southaven. The Sixth Circuit, applying the factors outlined above, held that Southaven was not a proper antitrust plaintiff.

This Court, applying these factors to this case, finds the Counties are not the proper antitrust plaintiffs. The first three factors discuss the nature of a plaintiff's injuries. As discussed above, the Court holds that plaintiffs have alleged no injury whatsoever; therefore, the first three factors militate against a finding of standing. The fourth factor is whether there is the potential for duplicative recovery. Without needing to decide, the Court notes that the municipalities involved, the citizens of the Counties, and competitor sludge disposal companies might be able to recover for the alleged antitrust violations. Thus, the potential exists. Last, as to the fifth factor, the municipalities, which pay the allegedly inflated amounts which the Counties merely collect, are the direct victims of the alleged violation. The cost is charged directly to them and the Counties merely collect the sums. Application of the *Southaven* factors, then, further supports this Court's finding of a lack of standing on behalf of the Counties.

RICO COUNTS

RICO provides remedies to anyone "injured in his business or property by reason of a violation of section 1962". 18 U.S.C. § 1964(c). For the reasons stated above, the Court holds that plaintiffs do not have standing to sue. They have

not been injured by any of the defendants' alleged activities. As held in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984), "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for". *Id.* at 296. Thus, it is the municipalities who are injured by the inflated prices and, if they do not pay the higher prices, then the City of Detroit takes the loss. Thus, the Counties are acting solely as collectors of these sums and are not injured.

Breach of Fiduciary Duty

Plaintiffs have sued Coleman A. Young for breach of his fiduciary duty as court-appointed Administrator of the DWWTP. Again, plaintiffs allege in paragraph 92 of their respective complaints that their injuries are the unconscionably inflated prices paid for the treatment and disposal of sewage. For the reasons set forth above, the Court holds that the Counties are not injured and, therefore, plaintiffs' counts for breach of fiduciary duty should be dismissed.

An appropriate order will be entered.

DATED: October 31, 1985

RICHARD F. SUHREHEINRICH

RICHARD F. SUHRHEINRICH
United States District Judge

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. art III, § 2[1]

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

15 U.S.C. § 15(a)

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the Defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Michigan Compiled Law 123.745. Municipality service contract with county; county contracts

Sec. 15. Any 1 or more municipalities or other public corporations, either within or without the county, shall have

authority to contract for the purchase of water or sewage or refuse services or transportation from a county operating under this act. Any charges specified in any such contract shall be subject to increase by such county at any time, if necessary, in order to provide funds to meet the obligations of the project involved. The county operating under this act may enter into contract with any public or private corporation, for the purchase by such county from or for the sale by the county to the corporation of water or sewage or refuse services, and for the right to transport sewage through the sewers of the county or of the corporation or to use the facilities of the other. Any contract authorized herein shall be for a period of not exceeding 50 years.

(7) (2) (2)

No. 89-56 No. 89-79 No. 89-101

Supreme Court, U.S.
FILED
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CLERK

In The
Supreme Court of the United States
October Term, 1989

NANCY ALLEVATO, as Personal Representative of the ESTATE OF MICHAEL J. FERRANTINO, SR., *ET AL.* (Petitioners in No. 89-56), THE CITY OF DETROIT (Petitioner in No. 89-79), AND COLEMAN A. YOUNG (Petitioner in No. 89-101),

Petitioners,

v.

THE COUNTY OF OAKLAND and THE COUNTY OF MACOMB,

Respondents.

THE COUNTY OF MACOMB'S BRIEF OPPOSING THE PETITIONS OF NANCY ALLEVATO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL J. FERRANTINO, SR., *ET AL.*, THE CITY OF DETROIT, AND COLEMAN A. YOUNG FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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17 CP

QUESTIONS PRESENTED

I.

Whether, because of the sparse substantive record in this case and its interlocutory posture, the issues presented merit present review by this Court?

II.

Whether the Respondent Counties which were the overcharged direct purchasers of sewerage services have standing to sue under §4 of the Clayton Act for price fixing violative of §1 of the Sherman Act, for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and for breach of fiduciary duty arising under state law?

III.

Whether the Court of Appeals for the Sixth Circuit properly rejected the "passing on" defense asserted by Petitioners when, under state law, any recovery obtained by the Respondent Counties would likewise be "passed on" to those municipalities and end-users?

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No. 89-56 No. 89-79 No. 89-101

In The Supreme Court of the United States

October Term, 1989

NANCY ALLEVATO, as Personal Representative of the ESTATE OF MICHAEL J. FERRANTINO, SR., *ET AL.* (Petitioners in No. 89-56), THE CITY OF DETROIT (Petitioner in No. 89-79), AND COLEMAN A. YOUNG (Petitioner in No. 89-101),

Petitioners,

v.

THE COUNTY OF OAKLAND and THE COUNTY OF MACOMB,

Respondents.

THE COUNTY OF MACOMB'S BRIEF OPPOSING THE PETITIONS OF NANCY ALLEVATO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL J. FERRANTINO, SR., *ET AL.*, THE CITY OF DETROIT, AND COLEMAN A. YOUNG FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, the County of Macomb, Michigan ("Macomb"), respectfully prays that this Court deny the petitions of Nancy Allevato, as Personal Representative of the Estate of Michael J. Ferrantino, Sr., *et al.*, the City of Detroit, and Coleman A. Young, for a writ of certiorari. The United States Court of Appeals for the Sixth Circuit reversed the district court's dismissal of Macomb's complaint and remanded the case for further proceedings. There is no conflict between the Sixth and Seventh Circuit Courts of Appeal on the unique and specific issues presented and the Sixth Circuit's decision is in accord with settled jurisprudential principles. Moreover, the issues presented should not be reviewed by this Court at this time, in any event, because of the sparse substantive record and the present interlocutory posture of this case.

STATEMENT OF THE CASE

The Counties of Oakland ("Oakland") and Macomb ("Macomb"), Michigan, (the "Counties" or "Respondents") commenced this antitrust and RICO treble damages action in 1984.[1] The action followed criminal convictions of several of the Petitioners, in *United States* v *Bowers*, 828 F.2d 1169 (1985). The Counties alleged that Petitioners participated in a scheme and pattern of illegal price-fixing and monopolizing regarding certain contracts for the disposal of sludge treated by the Detroit Water and Sewerage Department (the "DWSD"). Pursuant to state statute, Mich. Comp. Laws §46.173, the Counties had entered into contracts with the City of Detroit and the DWSD for sewerage services (the "Contracts"), and payments to Detroit under the Contracts included the alleged illegal overcharges for the disposal services.[2] Pursuant to those Contracts the Counties are the direct purchasers of the DWSD's sewerage services on behalf of themselves and the municipalities and residents within their political boundaries. Under those state statutes, the Counties do not derive a profit under the Contracts. Rather, they are to collect their costs, including payment to Detroit under the Contracts,

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[1] The Counties' action is pursuant to §4 of the Clayton Act, 15 U.S.C. §15, and the similar provision in RICO, 18 U.S.C. §1964(c). This case also involves a state law claim for breach of fiduciary duty against Petitioner Coleman A. Young.

[2] Public Act 342 of 1939 authorized counties to establish and provide county sewage services. A county exercising such authority must designate a "county agency" to discharge that authority and to be responsible for the supervision and control of the management of such services. Mich. Comp. Laws §46.173. The counties are authorized to build and maintain all necessary facilities; determine rates, charges and assessments to be collected for such services; and to enter into and enforce contracts in connection with such services, including contracts with users for the provision of such services. Mich. Comp. Laws §§46.171 *et seq.*

from the municipalities, which, in turn, allocate the costs to their residents. Mich. Comp. Laws §46.175.[3]

Macomb joined this action to recover damages for the illegally increased costs of sewerage services. Under state law, any recovery will inure to the benefit of the municipalities, and, ultimately, the residents of Macomb. The county agency that is responsible for managing the county sewage system must establish "just, equitable, and uniform rates, charges or assessments" and "the amounts fixed for rates, charges, or assessments" must only include the "complete and actual cost" of the sewage system. Mich. Comp. Laws §46.174.

Prior to filing answers, and prior to the conduct of any discovery, Petitioners moved to dismiss the complaints on numerous independent dispositive bases pursuant to Fed. R. Civ. P. 12(b)(6). The district court dismissed the complaints on the ground that the Counties lacked standing to sue.[4] 620 F. Supp. 1399. The Counties filed a motion to alter judgment, attaching an affidavit of the Oakland Chief Deputy

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[3] Each local governmental unit within a county system pays the county for sewage services out of funds it collects from users of the services. The funds collected by the counties are maintained by the counties in separate enterprise funds and may be used only for the purposes authorized by statute.

[4] Petitioners asserted numerous other grounds for dismissal. For example, the City of Detroit argued that the Counties' action was barred by the Local Government Antitrust Act of 1984, 15 U.S.C. §§34 *et seq.*; that the Counties had failed to plead a RICO claim because the entities and persons described in the complaint were not "separate"; and that the Counties had not sustained any damages. Petitioner Young, joined by Petitioner Allevato, asserted that the activities complained of were exempt state action; that the Counties' action was barred by judicial and executive governmental immunity; that the Counties' complaints failed to state an antitrust claim because no antitrust injury, in addition to injury in fact, had been pled and no injury to competition had been pled; and that the Noerr-Pennington doctrine provides an exception to the antitrust activity alleged in the complaints as a matter of law.

Drain Commissioner which clarified the contractual and political relationships between the DWSD, the Counties, the municipalities and their residents, the end users of the sewerage system. The court denied the motion, 628 F. Supp. 610, and the Counties appealed from the court's orders granting the motion to dismiss and denying the motion to alter that order.

On January 27, 1989, the Court of Appeals for the Sixth Circuit reversed the decision of the district court and reinstated the complaints. 866 F.2d 839. Nancy Allevato, as Personal Representative of the Estate of Michael J. Ferrantino, Sr., *et al.*, the City of Detroit, and Coleman A. Young then filed the instant Petitions for a Writ of Certiorari (the petitions of "Allevato", "Detroit", and "Young", respectively).

REASONS FOR DENYING THE PETITION

There has been no answer, discovery or trial in this case. The record includes only the Counties' complaints, an affidavit of Oakland's deputy drain commissioner, the Petitioners' motions to dismiss the complaints and supporting briefs and the Counties' briefs opposing dismissal. As noted above, other grounds for dismissal were asserted by Petitioners, which the district court has never addressed. In its present interlocutory posture the issues in this case do not warrant this Court's review at this time.

The Sixth Circuit's decision correctly applied this Court's decision in *Hanover Shoe, Inc.* v *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Contrary to the arguments in the petitions of Allevato and Young, the Sixth Circuit's decision does not conflict with the *en banc* decision of the Seventh Circuit in *State of Illinois ex rel. Harrington* v *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (*en banc*), *cert. denied*, ____ U.S. ____, 109 S.Ct. 543 (1988), nor is it inconsistent with this Court's decision in *Illinois Brick Co.*, v *State of Illinois*, 431 U.S. 720 (1977), or any of the decisions in other circuits applying *Illinois Brick*. The factual circumstances of this case,

including its public sector aspects, make this case unique and render application of the sound jurisprudential principles of *Hanover Shoe* and *Illinois Brick* relatively simple. Because this case presents the "perfect pass on" regarding both the illegal overcharges and the allocation of any recovery of damages for the overcharges, none of the complex economic and jurisprudential policy considerations presented in those cases are even implicated. In short, the difficult issue decided in *Hanover Shoe* — whether to allow a direct purchaser to recover a windfall rather than allowing antitrust violaters to escape liability — is simply not involved. Nor is there any risk that Petitioners will be exposed to multiple liability. The Sixth Circuit's decision serves all of the policies addressed in *Hanover Shoe* and in *Illinois Brick*.

THE SIXTH CIRCUIT CORRECTLY HELD THAT THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT CREATING AN EXCEPTION TO THE RULE IN *HANOVER SHOE*.

In *Hanover Shoe*, *supra*, this Court rejected as a matter of law the defensive use of the pass-on theory by an antitrust defendant against a direct purchaser who had sued for treble damages under §4 of the Clayton Act. The Court held that a direct purchaser is injured within the meaning of §4 by the full amount of the overcharge paid by it and that an antitrust defendant is not permitted to introduce evidence that the plaintiff had passed on the illegal overcharge to others farther along in the chain of distribution. 392 U.S. at 494. The Court followed long standing precedent that the "victim of an overcharge is damaged within the meaning of §4 to the extent of that overcharge." 392 U.S. at 491 (citing *Southern Pacific Co.* v *Darnell-Taenyer Lumber Co.*, 245 U.S. 531 (1918)).

The *Hanover Shoe* Court rejected the pass on defense notwithstanding "the argument that sound laws of economics require" that it be recognized. 392 U.S. at 492. The Court reasoned that accepting the defense would complicate treble-damage actions because of the economic uncertainties and complexities of quantifying the effects of the overcharge on the purchaser's prices, sales, costs, and profits. 392 U.S. at 492–493. Another equally important reason for the Court's rejection of the defense was its unwillingness to risk the chance that antitrust violators would "retain the fruits of their illegality" because indirect purchasers might "have only a tiny stake in the lawsuit" and much less incentive to sue than a direct purchaser. 392 U.S. at 494. The Court concluded that rejecting the pass-on defense was consistent with the Congressional intent of promoting the effective enforcement of the antitrust laws. 392 U.S. at 492–494. The Court reasoned:

> "[I]f buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. at 494.

The prospect of allowing the defensive use of the pass-on theory, either as a complete bar to a direct purchaser's action or as a limitation on the measure of damages, involved, among other things, the following competing policy considerations: (a) whether to allow an antitrust plaintiff who had "passed-on" all or some of an illegal overcharge to obtain a windfall —the entire amount of the overcharge or (b) whether to allow a

decrease in the effective enforcement of the antitrust laws by allowing violators to retain a portion of the illegal overcharges. As explained in *Illinois Brick Co.* v *Illinois*, *supra*, 431 U.S. at 752 (Brennan, J., dissenting):

> "*Hanover Shoe* thus confronted the Court with the choice, as had been true in *Darnell-Taenzer*, of interpreting §4 in a way that might overcompensate the plaintiff, who had certainly suffered some injury, or of defining it in a way that under-deters the violator by allowing him to retain a portion of his ill-gotten overcharges. The Court chose to interpret §4 so as to allow the plaintiff to recover for the entire overcharge. This choice was consistent with recognition of the importance of the treble damages action in deterring antitrust violations." *Id.*

Illinois Brick presented the related issue whether indirect purchasers could offensively assert the pass-on theory to recover damages pursuant to §4 for the portion of illegal overcharges passed on to them. This Court, by a six-to-three vote, held that only overcharged direct purchasers were "injured" within the meaning of §4. The Court declined to allow the offensive use of the pass-on theory for two reasons: to avoid the "serious risk of multiple liability for defendants," 431 U.S. at 732, and to avoid the "costs to the judicial system and the efficient enforcement of the antitrust laws" that would result from the complexities and uncertainties of analyzing "price and out-put decisions 'in the real economic world rather than an economist's hypothetical world.'" 431 U.S. at 732 (quoting *Hanover Shoe*, *supra*, 392 U.S. at 493).

The Illinois Brick Court confronted the choice of allowing the risk of multiple liability or denying recovery to indirect purchasers who had absorbed illegal overcharges "passed on" from innocent direct purchasers. The majority resolved, consistent with *Hanover Shoe*, to allow direct purchasers to

recover the full amount of the overcharge and to deny recovery to indirect purchasers. The majority reasoned:

> "We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws, see, *e.g.*, *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139, 88 S.Ct. 1981, 1984, 20 L.Ed.2d 982 (1968), supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers. But on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of '"private attorneys general"' to enforce the antitrust laws under §4, *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S., at 262, 92 S.Ct., at 891, is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.
>
> "It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations. Of course, as Mr. Justice BRENNAN points out in dissent, 'from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation.' *Post*, at 2082. But §4 has another purpose in addition to deterring violators * * *; it is also designed to compensate victims of antitrust violations for their injuries. * * * In view of the considerations supporting the *Hanover Shoe* rule, we are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all 'those within the defendant's chain of distribution,' *post*, at 2082, especially

> because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues." 431 U.S. at 746. (Footnotes and citations omitted.)

In *dicta*, the Court mentioned two possible narrow exceptions to the rule in *Hanover Shoe*, as recently noted by this Court in *California* v *ARC America Corp.*, 490 U.S. ____, 109 S.Ct. 1661, 1663, n2 (1989):

> "When the direct purchaser and the indirect purchaser have entered into pre-existing cost-plus contracts, *Illinois Brick Co.* v. *Illinois*, 431 U.S., at 732, n. 12, 97 S.Ct., at 2067, n. 12, and when the direct purchaser is owned or controlled by the indirect purchaser, *id.*, at 736, n. 16, 99 S.Ct., at 2070, n. 16."

Those possible narrow exceptions must be viewed in the light of the competing policy considerations underlying the rule in *Hanover Shoe*. The policies discussed in *Illinois Brick* and *Hanover Shoe* are these: *First*, that violators should not escape liability under the antitrust laws and those laws should be efficiently enforced; *Second*, that the antitrust laws should be construed to further the policies of deterrence and compensation; *Third*, that violators should not be exposed to multiple liability; and *Fourth*, that direct purchasers who have suffered no true injury should not be unjustly enriched by a windfall judgment. The Sixth Circuit's decision in this case serves all of those policies.

Petitioners acknowledge that Oakland and Macomb Counties are not like middleman merchants. That is, the Counties' Contracts with Detroit have been made pursuant to Michigan statutes which authorize the Counties to provide sewage services to their inhabitants and require that they do so at cost. As the petition of Allevato says: "[t]his case presents a perfect pass on * * *." Allevato petition at 13.

By law, the Counties' sewage operations must be nonprofit; the counties must charge sufficient amounts to their

constituent communities to recover the costs the Counties incur and they may not charge more. This means that, if the Counties recover, they will not garner a windfall, for they must pass on the recovery, as they passed on overcharges.[5] As Allevato's petition states, the Counties "could not retain the fruits of victory." Allevato Petition at 17. The Sixth Circuit made note of that legal obligation:

> "As we understand it, however, the funds are non-profit, so any recovery would ultimately have to be passed through to the end-users via charges lower than those that would otherwise be imposed." 886 F.2d at 850, n. 6.

The Counties operate sewage funds under state laws which make it clear that the Counties are not merchants engaging in trade. Rather, they are fulfilling a public health function with state-granted power to make and enforce contracts. This distinguishes the Counties from cost-plus middlemen, who operate for the purpose of making profits and avoiding losses. When an innocent middleman purchases from an antitrust violator, he is entitled to claim damages. However, if that middleman has passed his "injury" along to end purchasers, pursuant to cost-plus contracts, a fundamental problem in the administration of justice arises. If the middleman is allowed to recover the entire overcharge from the violator, he will receive a windfall which he will be able to pocket, because no theory of law permits the end purchasers to sue him. The middleman is innocent and the mere fact that he has recovered damages from a violator does not give end

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[5] The municipalities are entitled to demand faithful compliance with those state statutes. They do have the right to enforce the statutes and to seek judicial review of the rates the Counties set, which must be reasonable and must be based upon cost recovery. If the Counties obtain any recovery in this case, it will go into the sewer funds they administer for the purposes authorized by law — provision of sewer treatment services. *See* Mich. Comp. Laws §§46.171 *et seq*; Mich. Comp. Laws §§123.731 *et seq*.

purchasers a cause of action against him, at least not under the federal antitrust laws.

That is the problem that may warrant an exception to the rule in *Hanover Shoe*, if the difficulties of economic tracing can be overcome. That problem does not exist here, for the reasons so ably stated by Petitioners. Here, because of the unique statutory relationships among the Counties and their constituent communities and, in turn, between the communities and the end users, any recovery by the Counties must and will accrue to the benefit of the end purchasers. That is to say, if damages are awarded to the Counties, Michigan law requires that they be treated as sewage fund assets. At that point, they either can be refunded to the constituent communities or applied to defray sewage expenses being incurred by the Counties, with consequent reductions of the bills to the communities and, in turn, to the end users. The economic benefit of the recovery is thus apportioned to those who were injured by the illegal acts.

By virtue of state law, the "perfect pass on" truly has been created. Illegal overcharges have indeed been passed on by the Counties and, as a matter of law, it is inevitable that an award redressing the illegal overcharges also will be passed on by the Counties to the communities which suffered the wrongful burden. Thus, every element of justice considered by this Court in *Hanover Shoe* and *Illinois Brick* is satisfied. No duplicate recovery can occur because the Counties' recovery, if any, will inure to the benefit of those who have borne the ultimate costs. Nor will a violator escape liability. Efficient administration of justice will occur because this "perfect" pass on is a statutory two-way street.

Denying standing to the Counties in this case would frustrate the effective enforcement of the antitrust laws and would defeat the settled jurisprudential policies addressed in *Hanover Shoe* and *Illinois Brick*. Extended to its logical conclusion, Petitioners' pass-on defense would require that only the end-user residents would have standing to sue. The economic complexities of apportioning the illegal overcharges

at that level, and the relatively small stake in the litigation that each resident may have, would surely frustrate the effective enforcement of the antitrust laws and would allow Petitioners to retain some portion of the "ill-gotten overcharges." *Illinois Brick*, *supra*, 431 U.S. at 752 (Brennan, J., dissenting). In this case, the Sixth Circuit correctly held that, because all of the policies underlying the antitrust laws — including the deterrence and compensation policies — will be well served, the circumstances do not warrant creating an exception to the rule in *Hanover Shoe*.

CONCLUSION

For all of the above reasons, the Petitions of Allevato, Detroit and Young should be denied.

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No. 89-79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE CITY OF DETROIT,

Petitioner,

v.

THE COUNTY OF OAKLAND AND
THE COUNTY OF MACOMB,

Respondents.

PETITION OF THE CITY OF DETROIT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER CITY OF DETROIT'S RESPONSE TO RESPONDENTS' BRIEFS IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S SERVICE BY MAIL AT RESPONDENT'S COUNSEL'S CURRENT ADDRESS WAS PROPER.

II. WHETHER THE RESPONDENTS HAVE SUSTAINED AN INJURY WHEN THEY ARE NOT REQUIRED TO CONTRIBUTE ANY MONEY TO THE FUNDS IF MUNICIPALITIES AND END USERS DO NOT PAY THEIR BILL.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER CITY OF DETROIT'S RESPONSE TO RESPONDENTS' BRIEFS IN OPPOSITION

I. PETITIONER PROPERLY SERVED RESPONDENT OAKLAND

In response to Respondent Oakland County's Memorandum Requesting Denial of Petitioner's Petition for Writ of Certiorari, Petitioner City of Detroit states to this Court that on July 14, 1989, it properly served by mail, three (3) copies of its Petition in the above matter on Mr. Phillip G. Tannian, Counsel for Oakland County, at 243 West Congress Street, Suite 390, Detroit, Michigan 48226. (See Exhibit A). On that same date, Petitioner also properly served by mail, three (3) copies of its Petition on William W. Misterovich, Counsel for Macomb County, S. Allen Early III, Counsel for Mayor Coleman A. Young on a related Petition and Richard E. Zuckerman, Counsel for Nancy Allevato and others on a

related Petition. Messers. Misterovich, Early and Zuckerman received the Petitions sent to them. On August 4, 1989 Petitioners also served, by mail, a copy of their Notice of docketing of Petition for Certiorari and Appearance forms on Mr. Tannian and Mr. Misterovich.

On August 7, 1989, Counsel for Petitioner received a call from the offices of Mr. James Rubin, Co--Counsel for Oakland County, indicating that they wanted a copy of the Petition and one was mailed to them. (See Exhibit B). On August 8, 1989, Petitioner's Counsel, Cynthia K. Yott, spoke with someone from Mr. Rubin's Office who indicated that they wanted another copy of the Petition express-mailed to their office in Chicago. When Ms. Yott indicated that Respondent's copies ot the Petition had been previously served on Mr. Tannian, she was then informed that Mr. Tannian alleged that he had not received any Petitions. A copy of the Petition was express-mailed to Mr. Rubin's office on that day. (See Exhibit C).

On that same day, Ms. Yott telephoned Mr. Tannian to see if he had received the Petitions and he alleged that he had not. She then immediately verified Mr. Tannian's current address and that three (3) copies of the Petition had indeed been mailed to him on July 14, 1989. She had another copy hand-delivered to his office that day. (See Exhibit C). It is interesting to note that at no time did Counsel for Petitioner receive a call from Mr. Tannian's office indicating that he had not received copies of the Petition even after his co-counsel knew that a Petition had been filed by Detroit. Mr. Tannian was the lead and local counsel in the case before the lower courts.

Service by U.S. Mail is proper and allowable under the Rules of the U.S. Supreme Court. Petitioner has clearly complied with all of the applicable rules when it mailed three (3) copies of the petition to Mr. Tannian's current address. The Court should be aware that at no time has Petitioner attempted to "protract" any litigation in this matter, but has

merely exercised its proper rights in seeking to have the District Courts' decision in Petitioner's favor upheld.

Petitioner CITY OF DETROIT therefore requests that this Honorable Court deny Respondent's request to strike DETROIT'S Petition for Writ of Certiorari. Although Respondent Oakland did not specifically respond to the merits of Detroit's Petition for Certiorari, Detroit will respond below to the arguments presented in Respondent's Briefs regarding Mayor Coleman A. Young (89-101) and Nancy Allevato, et. al (89-56). Detroit would also adopt by reference, the responses of Young and Allevato in those cases.

II. RESPONDENTS SUSTAIN NO INJURY BECAUSE THEY ARE NOT OBLIGATED TO CONTRIBUTE TO THE FUNDS.

Respondents have not plead an injury sufficient to grant them standing under *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 342 U.S. 481 (1968). The Response Brief presented by Respondent Oakland misrepresents the facts of this case in an attempt to manufacture an injury.

Oakland's Brief insinuates that it is the County itself that is obligated to pay Detroit for sewage services used by the municipalities and end users. Oakland states "[b]y contract, the counties were obligated to purchase the services from Detroit and to pay for those services, even if they obtained no reimbursement for such services from their constituent municipalities." (p. 17).

What Oakland neglects to specifically tell this Court is that it is "obligated" only as the manager of the Funds to pay Detroit. All payment comes from the funds and only the municipalities and end users contribute to those funds. Oakland County does not contribute to the funds on behalf of the municipalities and end users. Its contracts with Detroit specifically prohibit any such contribution.

If a municipality or end user fails to pay its bill, the County will pay Detroit out of any reserve money in the

Funds. If no reserve money is available, then Detroit will be shorted. This is the position that Oakland has taken before in prior litigation. In its briefs before the Sixth Circuit in *County of Oakland v City of Berkley*, 742 F.2d 289 (6th Cir 1984), Oakland affirmatively stated that it served only as a "conduit":

> Pursuant to the system's agreement with the City of Detroit of November, 1962, the System is obligated to pay for all of the sewage it sends into the Detroit Water and Sewerage Department. Thus, if Madison Heights was held to be not obligated to pay for the portion of the storm water it sends to the City of Detroit, some other party to the contract must pick up the tab. *The Drain Commissioner has no obligation to do so under the contract. THE DRAIN COMMISSIONER HAS NO FUNDS OF HIS OWN IN THE OPERATION OF THE SYSTEM. HE IS THE CONDUIT OR MANAGING AGENT FOR THE MEMBERS OF THE SYSTEM.* Consequently, the other communities within the system would be obligated to shoulder the burden resulting from Madison Heights' exemption.

(R. 358: Joint Response, Ex. R at p. 21) (emphasis added).

Also in its Brief in *Berkley*, Oakland further contradicted its present position of being "directly injured."

> The [District] Court recognized the framework within which the Southeastern operated. *THAT FRAMEWORK, CREATED BY THE OCTOBER 1, 1962 AGREEMENT PUTS THE OAKLAND COUNTY DRAIN COMMISSIONER IN THE POSITION OF MANAGEMENT AGENT.* The Drain Commissioner is charged by the City of Detroit for sewage delivered by the District to the City of Detroit. The Drain Commissioner must collect adequate funds from the members of the District to pay the City of Detroit's charge and operate its own system. *In the event the Drain Commissioner is unable to raise sufficient funds from the members of the District to satisfy the charges of the City of Detroit, the City of Detroit suffers a loss.*

(R. 358: Joint Response, Ex. B at p. 12-13) (emphasis added).

Based upon these affirmative allegations, the Sixth Circuit held that the County was a "mere conduit" and was "an intermediary only, depending completely on payments from the municipalities to meet its obligation to Detroit," *Id.* at 292. The Court in *Berkley* held that "the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewerage disposal." *Id.* 296. This ruling is not dicta, nor is it inaccurate. It reflects the actual factual situation that exists, both in the instant and in the *Berkley* case.

The Affidavit of Robert Frederick II, filed by Oakland in the instant case, confirms that Oakland itself does not contribute any funds for payments. This Affidavit admits that Oakland obtains all of the monies needed to pay Detroit from the municipalities. (Paragraph 24, page B-8 of Respondents' Brief). The funds received from the municipalities consist of the charges levied by Detroit, an additional charge for Oakland's costs and a "charge for contribution to a reserve fund". (Paragraph 16(a) (v), page B-6). Clearly, Oakland does not contribute its own money to its Funds.

Nor is Oakland legally responsible for any payment to Detroit. Oakland admits that Detroit looks to Oakland for payment only as a "practical" matter. (Paragraph 27, page B-a). In reality, Oakland is only legally obligated to pay Detroit out of the Funds. If there is not reserve money left in the Funds, Detroit will not get paid. This is legally required both by law[1] and by contract. The contracts between Oakland and Detroit specifically state:

> The aforesaid charges to be paid by the County of Oakland shall be collected by said County through sewage disposal service agreements between the County of Oakland and the several subdivisions situated wholly or partly within said Southeastern Oakland County Sewage Disposal District, it being expressly understood and

[1] MCLA § 123.745-123.747 (1967 and Supp. 1989) does not authorize the Counties to sustain a loss with the Funds.

> agreed that neither the County of Oakland at large nor its general funds, nor the funds of the County Drain Commissioner of said County other than those pertaining to said sewage disposal district, shall in any way become liable under and by virtue of this agreement.[2]

The Sixth Circuit was clearly in error when it stated that the *Berkley* ruling was incorrect since the Counties paid whether or not the municipalities paid in full or on time. (A 11 nt 5). Oakland has not attempted to correct the lower Court, but rather seeks to further present this inaccurate position to this Court.[3]

---

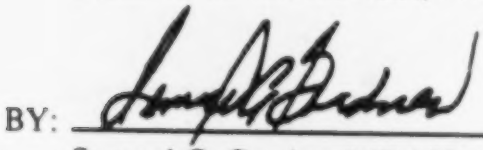
[2] This language is found in the November 23, 1942, contract between Detroit and Oakland County on behalf of the Southeastern Oakland County Sewerage Disposal District. This contract is still currently in force together with subsequent amendments and additions to other provisions. Similar if not identical language also appears in the contracts for the Evergreen/Farmington District.

[3] In its Brief on Rehearing before the Sixth Circuit, Detroit attempted to correct the Court's misunderstanding by seeking to have the contracts made part of the record. Although the contract provisions had been described and paraphrased by all parties, the actual contracts had not been placed into evidence before the lower Court. Up until the Court's January 27, 1989 ruling, it had not been necessary to do so since Oakland never denied that it collected all monies for the Fund from the municipalities and that it did not contribute any monies on their behalf. The Sixth Circuit declined to enlarge the record, stating that the contracts merely confirmed its assumption that "any and all overcharges were passed on". (A29). The contract language is offered here merely to clear up the ambiguity between Oakland's earlier assertions in *Berkley* and the Fredericks Affidavit, and those in its current response brief.

Clearly Oakland is merely a "conduit" or "managing agent" and incurs no injury to itself. Petitioner would therefore, request that this Honorable Court grant its Petition for Certiorari.

Respectfully submitted,

BELL AND GARDNER, P.C.

BY: 

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DATED: August 23, 1989

EXHIBITS

EXHIBIT A

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July 14, 1989

Clerk of the Court
United States Supreme Court
Washington, D.C. 20543

Re: Petition of the City of Detroit for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Dear Court Clerk:

Enclosed herewith for filing please find forty (40) copies of the Petition of the City of Detroit for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Affidavit, and Proof of Service, by Federal Express with regard to the above-mentioned matter. Also enclosed, please find one (1) *extra* copy with a note attached to have it time stamped, a self addressed, stamped envelope for your convenience in returning it to the undersigned. (Also Includes $200.00 Check for Filing Fee).

We are forwarding all attorneys of counsel three (3) copies of our Petition in the regular U.S. Mail as requested by the Court.

Thank you for your cooperation in this matter.

Very truly yours,

BELL AND GARDNER, P.C.

Cynthia K. Yott

CKY/rg
Enclosures

cc: (w/encl.) Phillip G. Tannian, Esq.
S. Allen Early, III, Esq.
David Zacks, Esq.
William W. Misterovich, Esq.
Richard Zuckerman, Esq.

No. 89—

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE CITY OF DETROIT,

Petitioner,

v.

THE COUNTY OF OAKLAND AND
THE COUNTY OF MACOMB,

Respondents.

PROOF OF SERVICE

STATE OF MICHIGAN
COUNTY OF WAYNE } SS.:

ROSALIND A. GOLDEN, being first duly sworn, deposes and says that on the 14th day of July, 1989, she served three (3) copies each of the document entitled: Petition of the City of Detroit For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit; Affidavit; and Proof of Service upon Respondents' Attorney, and all other opposing counsel, by regular U.S. Mail and placed said documents in a well-sealed envelope with postage fully prepaid thereon and correctly addressed to:

LIST OF COUNSEL OF RECORD

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and placed in a U.S. Mail Receptable located in Detroit, Michigan.

_____

ROSALIND A. GOLDEN

Subscribed and sworn to before me
this 14th day of July, 1989.

_____

LESLIE A. TARVER, Notary Public
Wayne County, Michigan
My Commission Expires: 12/10/89

EXHIBIT B

LAW OFFICES
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August 7, 1989

Allen Babbitt, Esq.
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Chicago, Illinois 60602

Re: *The City of Detroit* vs. *The County of Oakland and The County of Macomb*
Case No.: 89-79

Dear Mr. Babbitt:

Enclosed herewith please find a copy of the Petition of the City of Detroit for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, with regard to the above-captioned matter.

Thank you for your attention in this matter.

Very truly yours,

BELL AND GARDNER, P.C.

Cynthia K. Yott

CKY/rg

Enclosure

EXHIBIT C

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August 8, 1989

HAND-DELIVERED

Phillip G. Tannian, Esq.
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Re: *The City of Detroit* v *The County of Oakland and The County of Macomb*
Case No.: 89-79

Dear Mr. Tannian:

After our telephone conversation, I double checked my Proof of Service and found that three (3) copies of our Brief *was* mailed to your current address on July 14, 1989 and not your old address as I had assumed. I cannot explain your failure to receive them. Enclosed please find a copy of my Brief. I am Federal Expressing a copy to Butler and Rubin their request.

Very truly yours,

BELL AND GARDNER, P.C.

Cynthia K. Yott

CKY/rg
Enclosure

cc: James I. Rubin, Esq. (Federal Express)

(5) (4) (5)

Nos. 89-56, 89-79, and 89-101

Supreme Court, U.S.
FILED
DEC 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

NANCY ALLEVATO, ET AL., PETITIONERS

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

THE CITY OF DETROIT, PETITIONER

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

COLEMAN A. YOUNG, MAYOR OF THE CITY OF DETROIT, PETITIONER

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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JAMES F. RILL
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13 pp

QUESTIONS PRESENTED

1. Whether the rule of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), precludes proof that a direct purchaser has passed on the full amount of an overcharge caused by a third party's antitrust violation to its customers.

2. Whether the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c), confers standing on a direct purchaser who has passed on the full amount of any unlawful overcharge to its customers.

3. Whether a direct purchaser who has passed on the full amount of an overcharge to its customers has standing under Article III.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-56

NANCY ALLEVATO, ET AL., PETITIONERS

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

No. 89-79

THE CITY OF DETROIT, PETITIONER

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

No. 89-101

COLEMAN A. YOUNG, MAYOR OF THE CITY OF DETROIT, PETITIONER

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents Oakland County and Macomb County brought this action seeking damages for alleged over-

charges by petitioner City of Detroit arising out of alleged violations of the antitrust laws and of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq*. (RICO). In the Detroit, Michigan area, municipal sewer systems connect to interceptor sewers built and operated by counties. The counties' lines in turn connect to the Detroit system. Detroit treats the sewage at its wastewater treatment plant and disposes of the resulting sludge.

Relationships among the municipalities, the counties, and the City of Detroit are governed by contracts entered into pursuant to state law. Under those contracts, Detroit bills the counties for services provided.[1] The counties are responsible for paying these bills, but they in turn bill the municipalities for services based on their own costs, which include Detroit's charges, costs incurred in building, operating, and maintaining the county system, and an allowance for reserves. Costs are allocated to the municipalities under a number of formulas, some involving estimates of usage. The municipalities in turn bill their residential and commercial customers in a variety of ways, allocating the county's charges and adding enough to cover their own local expenses. Municipal payments to the counties are segregated in county "enterprise funds," through which the county systems are operated. The counties draw their payments to Detroit from the enterprise funds. Pet. 3, 4.

At a time when petitioner Coleman A. Young, the Mayor of Detroit, was acting as administrator of the wastewater treatment plant under court order, Detroit entered into various sludge hauling and disposal contracts. These transactions eventually led to the convictions of various in-

[1] Like the court below, we describe facts largely in relation to respondent Oakland County because respondent Macomb County provided fewer facts. See 89-56 Pet. App. 5a-6a.

dividuals and entities in the sludge hauling business for RICO, Hobbs Act, and mail fraud violations. Following the criminal investigation, the respondent counties brought a civil action grounded on the same transactions. Respondents sought treble damages under the Clayton Act, 15 U.S.C. 15 and RICO, alleging that Detroit's bills to them included unlawfully inflated costs.

2. The district court, on a slender record,[2] dismissed for lack of standing. The defendants contended that the counties had not been injured because they had passed on the overcharge to the municipalities. Recognizing that *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), had "severely restricted" the pass-on defense, the court nevertheless read a Sixth Circuit decision, *Obron* v. *Union Camp Corp.*, 477 F.2d 542 (1973) (adopting 355 F. Supp. 902 (E.D. Mich. 1972)), as establishing that the pass-on defense is valid where "circumstances are such that proof that any overcharged [direct purchasers] * * * have not been damaged is easy to prove." 89-56 Pet. App. 32a, 33a.

The court found those circumstances to exist in the structure of contractual relationships among Detroit, the counties, and the municipalities. In an earlier case where Oakland County had sued a municipality for sewer payments, the Sixth Circuit had found that "Oakland County served as an intermediary only, depending completely on payments from the municipalities to meet its obligations to Detroit," and that "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities * * * to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for." *County of Oakland* v. *City of Berkley*, 742 F.2d 289, 292, 296 (6th Cir.1984). Relying on those statements in *Berkley*, the

[2] The record consists of the pleadings and one affidavit.

district court found that the counties sustained no injury because they were only intermediaries and, in effect, were not buyers but only collection agencies. 89-56 Pet. App. 34a.[3] Therefore, the court held, the counties had not alleged the injury in fact constitutionally required for standing.

The court also concluded that an exception to *Hanover Shoe* would be appropriate, because there was no problem of tracing the overcharges to the municipalities and the municipalities would have ample incentive to sue. 89-56 Pet. App. 34a-35a.[4] It further concluded that under *Associated General Contractors* v. *State Council of Carpenters*, 459 U.S. 519 (1983), the counties were not proper antitrust plaintiffs, primarily because they had suffered no injury. 89-56 Pet. App. 36a. In a subsequent order denying a motion to alter judgment, the court noted that the arrangements in this case are "[i]n essence" a pre-existing cost plus contract, 89-56 Pet. App. 43a, and therefore within the cost plus exception to the rule of *Hanover Shoe*.

Finally, the court held that the counties lacked standing under RICO, which provides remedies to anyone "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. 1964(c). The court reasoned that the counties were mere conduits and thus were not injured.

3. A unanimous panel of the Sixth Circuit reversed, holding that the counties had both constitutional and statutory standing. It first rejected the district court's suggestion that the counties were not really buyers, but only agents of the municipalities. The court of appeals noted that Detroit had entered into contracts with Oakland, not the

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[3] The counties are also end users, paying the municipalities for sewage disposal services, but the court found that the counties had not sued in that capacity. 89-56 Pet. App. 42a.

[4] The court treated the municipalities as consumers, although they in turn passed overcharges along to other consumers.

municipalities, and that there was no showing that Detroit was entitled to look to the municipalities for payment. 89-56 Pet. App. 9a.

The court of appeals assumed for purposes of its decision that "any and all overcharges were passed on to the counties' own customers, the municipalities." 89-56 Pet. App. 11a. The court nevertheless found constitutional standing because, under applicable precedent, "[a] buyer who is induced to pay an unlawfully inflated price for goods or services obviously suffers an actual injury," and standing is not lost merely because the overcharge is passed on. 89-56 Pet. App. 12a. Relying on *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the court found that the counties had alleged injury in fact, because the counties were liable for the overcharge, whether or not the municipalities paid. 89-56 Pet App. 13a-14a. Moreover, the higher cost of sewage services to the end user would hamper the counties in their competition with other counties for residents and businesses.[5] Thus, "[i]t would clearly be wrong for us to conclude at the outset of this litigation, based merely on the pleadings and [one] * * * affidavit, that the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit." 89-56 Pet. App. 15a.

The court of appeals also found antitrust injury and standing. It read *Hanover Shoe* and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), not as establishing exceptions to the indirect purchaser rule, but only as suggesting that an exception might exist. 89-56 Pet. App. 20a.[6] It also held that a cost-plus exception would not preclude the counties from suing, because permitting the municipalities and/or

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[5] The counties had not alleged this precise injury, but had generally alleged that they were injured in their business or property.

[6] The court of appeals said that *Illinois Brick* had "implicitly repudiated" its prior decision in *Obron*, on which the district court had relied. 89-56 Pet. App. 19a, 20a.

the end users to sue would introduce "precisely the sort of complexities, uncertainties, and other untoward consequences that the indirect purchaser rule was designed to avoid." 89-56 Pet. App. 21a.[7] The court found that its conclusion was "strongly confirmed" by the *Associated General* factors, all of which, it concluded, supported standing for the counties. 89-56 Pet. App. 22a-25a.[8]

Finally, the court, noting that the treble damage provision of RICO was "patterned directly on § 4 of the Clayton Act," 89-56 Pet. App. 25a, concluded that most of its antitrust standing analysis applied to RICO standing as well: "If the counties are the proper parties to sue for damages allegedly arising out of violations of the antitrust laws, it seems clear that the counties are also the proper parties to sue for damages allegedly arising out of RICO violations." 89-56 Pet. App. 25a.

On rehearing, the court noted that *Illinois* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 109 S. Ct. 543 (1988), had recently recognized an exception to *Hanover Shoe* and *Illinois Brick* in the context of a pass-on required by state regulation, notwithstanding the absence of a fixed quantity guarantee. The court nevertheless declined to follow the Seventh Circuit's decision, reasoning that *Illinois Brick* had limited the possible cost plus exception to "contracts for a fixed quantity." 89-56 Pet. App. 27a-28a.

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[7] The court noted that there were multiple middlemen, that municipalities attempted to pass the overcharge on to end users, and that at best the pass on approach would lead to a massive class action in which ascertaining individuals' damages would be complex and difficult. 89-56 Pet. App. 21a-22a.

[8] The panel's rejection of the district court's conclusions on this point follow directly from its holding, contrary to that of the district court, that the counties properly alleged injury from an antitrust violation.

DISCUSSION

1. The central issue in this case, the proper scope of any cost-plus exception to the pass-on rule of *Hanover Shoe* and *Illinois Brick*, is an important question that has created considerable confusion in the lower courts. Petitioners contend that their use of a pass-on defense falls within the cost-plus exception to the rule of *Hanover Shoe* and *Illinois Brick*, even though there is in this case no preexisting cost-plus contract for a fixed quantity. *E.g.*, 89-56 Pet. 17. Assuming there is a cost-plus contract here,[9] this case presents the issue of the scope of the cost-plus exception.

Nevertheless, because of the unusual facts and the undeveloped state of the record, we believe that this case presents a less favorable context in which to resolve this issue than another case pending before this Court, *Kansas and Missouri, etc.* v. *Kansas Power & Light Company, et al.*, petition for cert. pending, No. 88-2109. First, the record here, consisting primarily of a single affidavit, provides minimal illumination of the factual context. Thus, the Court would be required to consider the question essentially in the abstract. It is unclear from the record, for example, whether either contract or statute requires the counties to pass on to the municipalities the full amount of any cost increases. It is also unclear how the counties' costs of administering the sewage system are passed on to the municipalities. Consequently, it cannot be determined whether an increase in Detroit's charges to the counties might lead the counties to absorb a higher proportion of those administrative costs. And it is unclear whether, in the event the counties do not

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[9] As we note, pp. 7-8 & note 10, *infra*, it is not clear that there is any legal requirement that the counties pass on cost increases to the municipalities.

pay Detroit's charges in full, Detroit is entitled to look to any county assets other than the enterprise funds.[10]

Second, under one plausible reading of the facts here, the issue presented may be narrower and of more limited applicability than the issue presented in *Kansas*. As we note in our brief in *Kansas*, much of the confusion in the lower courts concerns the significance of the "fixed quantity" requirement in this Court's formulation of the cost plus exception. In the absence of a fixed quantity provision, a direct purchaser may suffer lost profits because its customers purchase fewer of its products if it raises the price to reflect the overcharge. However, the record suggests that Michigan law and the terms of the contracts may insulate the counties from any such injury from lost profits as a result of reduced sales of sewage services. Viewing the record in this way, the Court might be able to decide the case on a ground of limited significance beyond the confines of this case. On the other hand, clarification of the cost plus exception in the context of the *Kansas* case is likely to resolve the issues in this case (to the extent they do not depend on facts not of record). Accordingly, we urge the Court to grant the petition in the *Kansas* case, and respectfully suggest that the Court defer acting on the petitions here pending disposition of that case.

2. In our view, neither the RICO issue nor the constitutional issue presented in the petitions warrants review. With respect to RICO, the court of appeals and the district court concluded that the proper analysis was essentially identical to that required under the Clayton Act. We know of no decision of any court reaching a contrary holding. Moreover,

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[10] We note that the court below pointed to the incomplete state of the record in refusing to hold that "the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit." 89-56 Pet. App. 15a.

it seems plain that the court of appeals would have reached a different result had it concluded that respondents lacked standing under the Clayton Act. There is thus no reason for the Court to decide the RICO standing question now.

The question of constitutional standing also does not warrant review by this Court. If respondents have properly alleged injury to their business or property under the Clayton Act, RICO, or both, it seems plain that they have properly alleged injury for purposes of Article III. If they have not properly alleged injury under either the Clayton Act or RICO, it does not matter whether they have properly alleged injury for the purposes of Article III, since they claim no cause of action other than under the Clayton Act and RICO.

CONCLUSION

This Court should hold the petition for certiorari pending its disposition of *Kansas and Missouri, etc.* v. *Kansas Power & Light Company, et al.* No. 88-2109.

Respectfully submitted.

KENNETH W. STARR
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DECEMBER 1989

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